87-925

Supreme Court, U.S.
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No. .....

In the Supreme Court
OF THE
United States of America

OCTOBER TERM, 1987

LAWRENCE J. GALARDI,
Petitioner,

VS.

THE STATE BAR OF CALIFORNIA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CALIFORNIA

PETITION FOR WRIT OF CERTIORARI AND APPENDIX

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QUESTIONS PRESENTED

1. Does the decision of the California Supreme Court as to various Federal questions warrant the granting of Certiorari where that decision is in conflict with decisions of the Bankruptcy Court on the same issues and as between the same parties or their privies?

2. Does the failure of the California Court to abide the Supremacy Clause warrant the grant of Certiorari?

3. Is the failure to accord Petitioner Equal Protection of the laws in these circumstances a denial of due process guaranteed by the Fourteenth Amendment, Section 1?

4. Is the decision appealed from a departure from this Court's decisions as to res judicata and collateral estoppel?

5. Are the decisions of the Bankruptcy Court as to exclusive matters of dischargability entitled to Full Faith and Credit pursuant to Article IV, Section 1?

6. Is Certiorari warranted in order to afford Constitutional guarantees to members of the bar in non-client, non-practice related business activities, placed in jeopardy here by the California Court's decision?

PARTIES

Petitioner submits the following list of all persons or entities which have an interest in the outcome of the case before this Court.

Lawrence J. Galardi — Petitioner

The State Bar of California — Respondent

Bernie Lerner — Respondent in United States Supreme Court Docket No. 87-691: Complainant to the State Bar of California. Plaintiff and Cross-Defendant in LA 81-5204. Defendant in LA 81-0656, consolidated by the Court after decision.

John P. Taylor — Plaintiff and Cross-Defendant in consolidated adversary proceeding numbers LA 81-0653 and LA 81-5220: Complainant to the State Bar of California.

STATEMENT OF RELATED CASES BEFORE THE SUPREME COURT OF THE UNITED STATES

Lawrence J. Galardi v. Bernie Lerner; Docket No. 87-691. Petition for Writ of Certiorari filed September 22, 1987.

DATED: November 30, 1987

LAWRENCE J. GALARDI
Attorney for Petitioner

TOPICAL INDEX

	Page
STATEMENT	1
A. Preliminary	1
B. Issues on Review and Rehearing in the California Supreme Court: This Court's Jurisdiction	2
C. The Decision Appealed From	6
D. Factual Summary	12
REASONS FOR GRANTING CERTIORARI	14
ARGUMENT	15
Point I	
CERTIORARI IS WARRANTED WHERE THE CALIFORNIA SUPREME COURT HAS DECIDED A FEDERAL QUESTION IN A WAY IN CONFLICT WITH THE SUPREMACY CLAUSE	15
Point II	
THE DECISION OF THE BANKRUPTCY COURT AS TO *TAYLOR V. GALARDI* IS RES JUDICATA; AND IT MAY NOT BE COLLATERALLY ATTACKED	22
Point III	
ABSENCE OF FIDUCIARY RELATIONSHIP AS TO EITHER *TAYLOR* OR *LERNER* IS RES JUDICATA	26

Page

Point IV

THE BANKRUPTCY COURT DECISION IN *TAYLOR V. GALARDI* IS ENTITLED TO FULL FAITH AND CREDIT PURSUANT TO ARTICLE IV, SECTION 1 27

SUMMARY OF ARGUMENT 28

CONCLUSION 29

INDEX OF APPENDICES

A. Decision denying Rehearing filed September 2, 1987.

B. Decision of Supreme Court of the State of California filed August 3, 1987.

C. Decision of the State Bar Panel filed July 29, 1985.

D. Opinion of the Bankruptcy Court in *Taylor v. Galardi,* LA 81-0653 RS, entered December 27, 1983.

E. Lerner Declaration sworn to under penalty of perjury dated May 26, 1983.

F. Order Dismissing Involuntary Petition in Re Taylor/Galardi partnership, LA 82-20724.

G. Order Dismissing Involuntary Petition in Re Lerner/Galardi partnership, LA 82-20725.

H. Brief of Amicus Curiae filed in the Supreme Court of the State of California on October 31, 1986.

I. Excerpts from Petition for Review filed in the Supreme Court of the State of California on May 5, 1986.

J. Petition for Rehearing filed in the Supreme Court of the State of California on August 18, 1987.

K. Excerpt from Proposed Findings of Fact and Conclusions of Law submitted by the Client Security Fund Commission of Respondent State Bar and adopted on November 20, 1987.

TABLE OF AUTHORITIES CITED

Cases

	Page
Allen v. McCurry (1980) 449 U.S. 90, 66 L.Ed.2d 308, 101 S.Ct. 411	24
Allen v. State Bar (1962) 58 Cal.2d 912, 26 Cal.Rptr. 771	11
Bates v. State Bar of Arizona (1977) 433 U.S. 350, 53 L.Ed. 810, 97 S.Ct. 2691	16
C.I. Engineers & Constructors, Inc. v. Johnson & Turner Painting Co. (1983) 140 Cal.App.3d 1011, 189 Cal.Rptr. 824	26
Chicago, R.I. & T. Co. v. Perry (1922) 259 U.S. 548, 66 L.Ed. 1056, 42 S.Ct. 524	4
Cissna v. Tennessee (1918) 246 U.S. 289, 62 L.Ed. 720, 38 S.Ct. 306	5
Cromwell v. County of Sacramento (1877) 94 U.S. 351, 24 L.Ed. 195	25
Davis v. Aetna Acceptance Co. (1934) 293 U.S. 328, 55 S.Ct. 151	8
Dowell v. Applegate (1894) 152 U.S. 237, 38 L.Ed. 463, 14 S.Ct. 611	24
Grimes v. Hoschler (1974) 12 Cal.3d 305	11
Hart Steel Co. v. Railroad Supply Co. (1917) 244 U.S. 294, 61 L.Ed. 1148, 37 S.Ct. 506	24
Henry v. Mississippi (1965) 379 U.S. 443, 13 L.Ed.2d 408, 85 S.Ct. 564, *reh den* 380 U.S. 926, 13 L.Ed.2d 813, 85 S.Ct. 878	5
Hoag v. New Jersey (1958) 356 U.S. 464, 2 L.Ed. 2d 913, 78 S.Ct. 88829, *reh den* 357 U.S. 933, 2 L.Ed.2d 1375, 78 S.Ct. 1366	25

TABLE OF AUTHORITIES CITED

CASES

	Page
Illinois v. Milwaukee (1972) 406 U.S. 91, 31 L.Ed. 2d 712, 92 S.Ct. 1385	22
In Re Andreani (1939) 14 Cal.2d 736	11
In Re Brian S. (1982) 130 Cal.App.3d 523, 529	20
In Re Pedrazzini (9th Cir. 1981) 644 F.2d 756	8
In Re Thornton (9th Cir. 1976) 544 F.2d 1005	8
Jankovich v. Indiana Toll Road Com. (1965) 379 U.S. 487, 13 L.Ed.2d 439, 85 S.Ct. 493	5
Kelly, State's Attorney v. Robinson (1986) ___U.S. ___, 93 L.Ed. 216, 107 S.Ct. 353	5, 12, 18, 19
Kuehner v. Irving Trust Co. (1937) 299 U.S. 445, 451-452	17
Lawler v. National Screen Service Corp. (1955) 345 U.S. 322, 99 L.Ed. 1122, 75 S.Ct. 865	24
Local Loan Co. v. Hunt (1934) 292 U.S. 234, 244	16, 21
Louisville Bank v. Radford (1934) 295 U.S. 555, 587-588	17
Manhattan Life Ins. Co. v. Cohen (1914) 234 U.S. 123, 58 L.Ed. 1254, 34 S.Ct. 874	4
Midatlantic Nat'l Bank v. New Jersey Dept. of Environmental Protection (1986) 474 U.S. 494	23
Missouri ex rel. Missouri Ins. Co. v. Gehmer (1930) 281 U.S. 313, 74 L.Ed. 870, 50 S.Ct. 326	4
Paine & Williams Co. v. Baldwin Rubber Co. (1940, CA 6) 113 F.2d 840	25
Palmer v. Radio Corporation of America (1971) 453 F.2d 1133, 1140-1141	17

TABLE OF AUTHORITIES CITED

CASES

	Page
Partmar Corp. v. Paramount Theaters Corp. (1954) 347 U.S. 89, 98 L.Ed. 532, 74 S.Ct. 414, *reh den* 347 U.S. 931, 98 L.Ed. 1083, 74 S.Ct. 527	22, 24, 25
People v. Calhoun (1983) 145 Cal.App.3d 568, 570-572	18, 20
People v. Richards (1976) 17 Cal.3d 614, 620-622	
People v. Washburn (1979) 97 Cal.App.3d 621, 622-626	18
Perez v. Campbell (1971) 402 U.S. 637, 29 L.Ed.2d 233	11, 21
Saunders v. Shaw (1917) 244 U.S. 317, 61 L.Ed. 1163, 37 S.Ct. 638	4
Sayward v. Denny (1895) 158 U.S. 180, 39 L.Ed. 941, 16 S.Ct. 777	5
Southern Pacific Rail Co. v. United States (1897) 168 U.S. 1	25
State of New York v. Mosesson, 78 Misc.2d, 217, 356, N.Y.S.2d 483 (1974)	5
Staub v. Baxley (1958) 355 U.S. 313, 2 L.Ed.2d 302, 78 S.Ct. 277	5
Street v. New York (1969) 394 U.S. 576, 22 L.Ed.2d 572, 89 S.Ct. 1354	5
The Evergreens v. The Nunan (1944, CA 2) 141 F.2d 927, *Cert. Den.,* 323 U.S. 720, 89 L.Ed. 579, 65 S.Ct. 49	28
United States Trust Co. v. New Jersey (1976) 431 U.S. 1, 19-20, 52 L.Ed.2d, 108, 97 S.Ct. 1505	26
Werner v. State Bar (1954) 42 Cal.2d 187, 265 P.2d 912	11

TABLE OF AUTHORITIES CITED

CASES

	Page
Whitefield v. Ohio (1936) 297 U.S. 431, 80 L.Ed. 778, 56 S.Ct. 532	4
Williams v. United States Fidelity & Guaranty Co. (1915) 236 U.S. 549, 554-555	21
Younger v. Harris (1971) 401 U.S. 37	5
Zdanok v. Glidden Co (1964 CA 2) 327 F.2d 944	22

Constitution

Constitution of the United States

Article I 6
Article III 12
Article IV ..... i, 4, 15, 27, 28
Article VI 3, 4, 6, 15, 24
Equal Protections 7, 10, 15, 17
Fourteenth Amendment ..... i, 10, 12, 15, 17, 24, 28
Seventh Amendment 12
Supremacy Clause 3, 4, 6, 15, 16, 17, 21, 22, 28

Statutes

Bankruptcy Act 10, 15, 16, 17, 20, 22
Bankruptcy Code 17
California Business and Professions Code 1, 4, 9, 10, 11, 16
Sec. 6067 ..... 9, 15
Sec. 6068 ..... 9, 15
Sec. 6103 ..... 10, 15
Sec. 6106 ..... 10, 15

Table of Authorities Cited

Statutes

Page

United States Code

Sec. 523 ..... 11, 15, 22

Sec. 524 ..... 6, 11, 15, 16, 22

Rules

California Rules of Court 27(a) 2

Other Authorities

9 Stanf.L.Rev. 28 27

16 Am.Jur.2d, Constitutional Law, Sec. 491 17

31 A.L.R.3d 1068 27

34 A.L.R.3d 518 27

53 Cal.L.Rev. 25 27

57 Harv.L.Review 98; 56 Cal.L.Rev. 1098 27

House Report No. 95-595, pages 177-178, 186 (5 U.S. Code Congressional and Administrative News (1978, 95th Congress, Second Session) pages 6138-6139, 6147) 17, 21

Rest.2d, Judgments Sec. 29 27

Senate Report No. 95-989, pages 6-7, 98 (5 U.S. Code Congressional and Administrative News (1978, 95th Congress, Second Session) pages 5792-5793, 5884) 16, 20

Vestal, "The Constitution and Preclusion/Res Judicata, 62 Michigan Law Review 33 (1963) .. 25

Victim Restitution in the Criminal Process; A Procedural Analysis, 97 Harv.L.Rev. 931 (1984) .. 12

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PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CALIFORNIA

STATEMENT

A. Preliminary

This is a Petition for Writ of Certiorari to the Supreme Court of the State of California, appealing its decision and judgment rendered after review of a State Bar matter initiated by complaints of Attorney Richard S. Lerner on behalf of his clients Bernie Lerner and John Taylor. The Respondent State Bar commenced the within proceedings premised upon Complainants' allegations of joint venture, partnership, attorney-client relationship and breach of fiduciary duty. Respondent asserts there were violations of the *Business and Professions Code*. The decision of the State Bar Panel (Appendix C) and the recommendations of the Review Department modifying that decision were before the Supreme Court, on appeal. The decision of the

Supreme Court considered all issues *de novo* and modified the decisions of both the Hearing Panel and the Respondent's Review Department. The Panel, the Review Department and the Supreme Court found there was no attorney-client relationship, at any time (Appendix B). Petitioner sought Rehearing in order to obtain clarification of limited issues pursuant to California Rules of Court 27(a); and rehearing was denied (Appendix A).

B. Issues on Review and Rehearing in the California Supreme Court: This Court's Jurisdiction.

The Court below was asked to review whether the prior decisions in the Federal Court[1] constituted a bar to relitigating issues already fully adjudicated on the merits because of the Supremacy Clause, because of the jurisdictional impediment created by preemption of the Bankruptcy Act, and because of the res judicata and collateral estoppel effect of those decisions. Specifically, the Court below was asked to determine whether:

1. Complainant Taylor had any legal or equitable interest in Petitioner's properties or in monies borrowed by Petitioner and secured by Petitioner's properties. (See also Appendix D); and,

2. Whether the Lerner/Galardi "Joint Venture Agreement" should be given any weight, in any respect, in determining the issue of fiduciary relationship in these circumstances. (See also, Appendix E and Appendix G.)

On Petition for Rehearing the Court was asked to reconsider the Taylor Claim made to Respondent and reinstated by the decision appealed from, in view of the

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[1]United States Bankruptcy Court, *Taylor v. Galardi*, LA 81-0653, Appendix D; in re Lerner/Galardi Partnership, LA 82-20725, Appendix G; and in re Taylor/Galardi Partnership, LA 82-20724, Appendix F.

impediment to re-litigation and reinstatement presented by the Supremacy Clause. The Court was also asked to reconsider the Lerner Claim, focusing particularly on the Supremacy Clause and the collateral estoppel and res judicata effect of the prior decisions on issues of partnership. The Court was asked to deny both Respondent and Complainants the right and opportunity to disavow Complainants' sworn statement to the Bankruptcy Court that there were no partnerships and the monies were unsecured loans.

Petitioner urged re-litigation of the Taylor transaction by the State Bar was barred by the Supremacy Clause. U.S. Constitution Article VI, Section 2. The Taylor transaction, including all claims and allegations made by Taylor in the Superior Court action, was initiated by attorney Lerner and thereafter transferred to the Federal Court. It was fully tried in the Bankruptcy Court and decided in Petitioner's favor resulting in a final judgment discharging Petitioner's debt by virtue of the Taylor loan. That decision and judgment was before the State Bar Panel.[2] Petitioner perfected the issues of prior adjudication of the Taylor transaction and Petitioner's objection to "restitution," and those matters were briefed to both the Panel, the Review Department and the Court below.

In addition, the Brief of Amicus directed the attention of the Court below to the Supremacy Clause.[3] The California Supreme Court ruled Petitioner had waived any objection to restitution based on the Supremacy Clause.

The decision is neither precise nor clear as to whether the California Supreme Court believed these issues of prior adjudication in the Bankruptcy Court had not been

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[2]The State Bar Panel Exhibit K is Appendix D, this Petition.

[3]See, Footnote 3 of the Decision below, Appendix B; and the Brief of Amicus, Appendix H.

raised before the Panel and the Review Department (*Chicago, R.I. & T. Co. v. Perry* (1922) 259 U.S. 548, 66 L.Ed. 1056, 42 S.Ct. 524; *Whitefield v. Ohio* (1936) 297 U.S. 431, 80 L.Ed. 778, 56 S.Ct. 532. Although briefed and argued and the subject of evidence, as aforesaid, there does not appear to be any requirement that the federal issues presented here must be raised in the state administrative proceeding before they are raised in the State Appellate Court. In any case, the Supremacy Clause conflict was a result of the Review Department's decision and the denial of Equal Protections arises as a result of the California Supreme Court decision. It is also clear the California Supreme Court actually considered the Supremacy Clause conflict, albeit without satisfactorily deciding the issues of preemption of Federal Bankruptcy Law in matters of dischargability of debts. There is no legal basis, therefore, to invoke the shield of waiver on behalf of Respondent in these circumstances. The decision challenged is a product of an administrative review system that provides for direct appeal to the State's highest Court once Respondent's Panel and Review Department have done their work. Upon review, various Federal questions were raised and are here on Petition for Certiorari. *Saunders v. Shaw* (1917) 244 U.S. 317, 61 L.Ed. 1163, 37 S.Ct. 638; *Missouri ex rel. Missouri Ins. Co. v. Gehmer* (1930) 281 U.S. 313, 74 L.Ed. 870, 50 S.Ct. 326. The Court below and Respondent's Panel and Review Department clearly had before them the issues of collateral estoppel and res judicata of prior Federal Court disposition and the Supremacy Clause. The Appellate Court's disposition of those issues was an unconstitutional exercise placing Respondent's reliance upon the Business and Professions Code above the constitutional guarantees of Article VI, Clause 2, the Fourteenth Amendment, Section 1, and Article IV, section 1. *Manhattan Life Ins. Co. v. Cohen* (1914) 234 U.S. 123, 58 L.Ed.

1254, 34 S.Ct. 874; *Cissna v. Tennessee* (1918) 246 U.S. 289, 62 L.Ed. 720, 38 S.Ct. 306.

In the final analysis, it is fair and reasonable to conclude the California Supreme Court attempted to thus bypass adjudicating a federal right by applying a doctrine of waiver in the face of the record made during the hearings conducted by Respondent and in the Bankruptcy Court. *Street v. New York* (1969) 394 U.S. 576, 22 L.Ed.2d 572, 89 S.Ct. 1345; *Sayward v. Denny* (1895) 158 U.S. 180, 39 L.Ed. 941, 16 S.Ct. 777.

While the supervision of attorneys is a legitimate State interest, it must not be arbitrarily accomplished at the sacrifice of constitutional guarantees and without regard to matters preempted by the exclusive jurisdiction of the Bankruptcy Court. *Staub v. Baxley* (1958) 355 U.S. 313, 2 L.Ed.2d 302, 78 S.Ct. 277; *Jankovich v. Indiana Toll Road Com.* (1965) 379 U.S. 487, 13 L.Ed.2d 439, 85 S.Ct. 493; *Henry v. Mississippi* (1965) 379 U.S. 443, 13 L.Ed.2d 408, 85 S.Ct. 564, *reh den*, 380 U.S. 926, 13 L.Ed.2d 813, 85 S.Ct. 878; *Street v. New York, supra.*

There is no issue of Federal interference here with the State's right to administer its criminal justice system. *Younger v. Harris* (1971) 401 U.S. 37. Absent the considerations necessary in a criminal sentence of assuring the defendant will lead a law-abiding life during probation, *State of New York v. Mosesson,* 78 Misc.2d, 217, 356, N.Y.S.2d 483 (1974), there is no room to conclude here that enforcement of penal sanctions as an exercise of retained State sovereignty, will be interfered with in giving Full Faith and Credit to the dispositions by the Bankruptcy Court. *Younger v. Harris, supra; Kelly, State's Attorney v. Robinson* (1986) ____ U.S. ____, 93 L.Ed. 216, 107 S.Ct. 353.

At oral argument on May 8, 1987 counsel for Petitioner embraced the brief and argument of Amicus vis-a-vis the

applicability of the Supremacy Clause. (Appendix H; Appendix J) Petitioner further urged upon Rehearing that if the Court's reference in Footnote 3 of its decision results in Petitioner suffering the loss of the protection of the Supremacy Clause, that would in effect, elevate form over substance, i.e., require some additional articulation of the Constitutional protection other than what was tried before the State Bar Panel and later briefed to the Respondent's Review Department by Petitioner and before the Court below, by Amicus. At every stage, the Bankruptcy Court decisions were before the Respondent in conducting its purely administrative proceedings and the Supreme Court upon review.

Petitioner also urged the Supremacy Clause presented a jurisdictional bar to forcible reinstatement relying upon Article 6, Section 2 of the Constitution when read with Article 1, Section 8, Clause 4, the Bankruptcy Powers and the provisions of 11 U.S.C., Section 524 (1984). Other than the footnote reference that the Constitutional protection had been waived, the Court below did not comment on the preemptive authority of the Bankruptcy nondischargability statute. Because of that preemption, Petitioner submits, the application of Supremacy Clause principles is jurisdictional.

C. The Decision Appealed From

The Supreme Court concluded 30 days actual suspension with five years of probation and restitution in the total amount of $186,000 ($101,000 to the Lerner claimants and $85,000 to the Taylor claimant) was required.[4] The 30-day actual suspension commenced on September 3, 1987 and was concluded on October 3, 1987. The Court

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[4]The Hearing Panel concluded only a private letter of reprimand was warranted upon the evidence it heard. The Review Department imposed harsher discipline. Appendix B.

concluded there were two "Joint Venture Agreements", one with Bernie Lerner and the other with John Taylor. The Court concluded the findings of the State Bar Court were presumed to be supported by the record and that Petitioner had failed to demonstrate the charges of "unprofessional conduct" were not sustained by convincing proof and to a reasonable certainty. The Court found the conduct was non-client related, however.[5] The Court concluded it would not disturb the resolution of the State Bar Panel and Review Department on the issue of loan versus joint venture stating the "documentary evidence" does not support Petitioner's version of the facts.

The Court relied upon the characterization of "Joint Venture" in the agreements. The agreements were written, however, to disguise the loans, and the Court thus ignored the plain reality that the disguise contrived by Attorney Richard Lerner, who represented his brother Bernie Lerner, would not have been a disguise, at all, if the agreement carried language describing the transaction as a loan. The State Bar concluded there was a Lerner/Galardi partnership and a Taylor/Galardi partnership. The Bankruptcy Court concluded otherwise and a different result was reached, as hereinafter appears.

The California Court concluded that because the State Bar was not a party to the Bankruptcy actions it was not bound by the findings or conclusions or judgment of discharge of the Bankruptcy Courts.[6]

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[5]The Court stated, "Here, the misconduct occurred in the course of Petitioner's business dealings and not during his representation of legal clients." The Equal Protections issue was thus raised.

[6]The decision after trial on the merits in *Taylor v. Galardi*, LA 81-0653 and the consistent decisions dismissing the involuntary Petitions against the purported partnerships, are consistent with and require the conclusion that there were no partnerships. The Petition for Certiorari docketed in this Court, No. 97-691 seeks a reconcilia-

Finally, the Court below looked behind the declaration of Bernie Lerner filed in the Bankruptcy Court (presented to the State Bar Panel), and concluded that Complainant Bernie Lerner was not truthful in his declaration when he stated under oath he had agreed to *lend* Petitioner $101,000 and that he was *not Petitioner's partner*. That declaration was the basis for the Federal Bankruptcy Court's dismissal of the partnerships that were earlier alleged by the Lerners, later denied by them and then revived again, in their complaints to the Respondent State Bar.

The Court acknowledged the findings of both the Panel and Respondent State Bar that there was no attorney-client relationship, but, nevertheless found a fiduciary duty was essentially artificially created through written agreement,[7] in addition to its alternative finding that there were partnership joint ventures. The *Taylor* agreement, however, notably contains absolutely *no such language* and that basis for concluding fiduciary or trust relationships is absent, as to Taylor, notwithstanding the contrary conclusion in the decision appealed from.

On the basis of the "partnership" conclusion as to both Lerner and Taylor and the trust status that was concluded to as opposed to the relationship of lender-borrower, the Court reached a variety of conclusions all

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tion and resolution of the result in *Lerner v. Galardi,* L.A. 81-5204 and the consolidated case LA 81-0656. Necessarily, the contrivances and conduct of Attorney Lerner are briefed in greater detail in Docket 87-691.

[7]This is contrary to the time-worn principle that no fiduciary relationship artificially created by an agreement prior to the acts complained of will create a trust. *Davis v. Aetna Acceptance Co.* (1934) 293 U.S. 328, 55 S.Ct. 151; *In Re Thornton* (9th Cir. 1976) 544 F.2d 1005; *In Re Pedrazzini* (9th Cir. 1981) 644 F.2d 756. The Court below was not thus persuaded upon rehearing. Appendix J; Appendix A.

related to Petitioner's handling of his assets, his properties and monies borrowed and secured by Petitioner's properties. Those conclusions, each and all of them, must be uniformly discarded if the Federal Court was correct and there were no partnerships and therefore no fiduciary duties arising therefrom, and if the Court below is estopped from reaching conclusions inconsistent with those reached in the United States Bankruptcy Court.

The California Supreme Court, upon *de novo* review, nowhere stated or concluded there were acts of moral turpitude or dishonesty. The Court held, however, that attorneys owed a fiduciary duty to *non-clients* in business dealings.[8] The Code governs Respondent and Counsel. It

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[8]The Business and Professions Code provisions relied upon by Respondent follow:

Sec. 6067. "Every person on his admission shall take an oath to support the Constitution of the United States and the Constitution of the State of California, and faithfully to discharge the duties of any attorney at law to the best of his knowledge and ability. A certificate of the oath shall be indorsed upon his license."

Sec. 6068. "It is the duty of an attorney: (a) To support the Constitution and law of the United States and of this State. (b) To maintain the respect due to the courts of justice and judicial officers. (c) To counsel or maintain such actions, proceedings or defenses only as appear to him legal or just, except the defense of a person charged with a public offense. (d) To employ, for the purpose of maintaining the causes confided to him such means only as are consistent with truth, and never to seek to mislead the judge or any judicial officer by an artifice or false statement of fact or law. (e) To maintain inviolate the confidence, and at every peril to himself to preserve the secrets, of his client. (f) To abstain from all offensive personality, and to advance no fact prejudicial to the honor or reputation of a party or witness, unless required by the justice of the cause with which he is charged. (g) Not to encourage either the commencement or the continuance of an action or proceeding from any corrupt motive or passion or interest. (h) Never to reject, for any consideration personal to himself, the cause of the defenseless or the oppressed."

is at once both enabling legislation and a guide for attorney conduct in the practice of law. There is no provision in the California Business and Professions Code creating fiduciary duties outside the attorney-client relationship, and no provisions claim preeminence over the Bankruptcy Act.

The Court thus applied a different standard to persons in business transactions, who happen also to be attorneys, and notwithstanding there was no attorney-client relationship and there was separate legal representation of the complaining businessman. It is in that respect that a denial of Equal Protections under the Fourteenth Amendment, Section 1 arises.

Thus applying the Business and Professions Code to non-client related business transactions serves to measure the standards of participating businessmen differently. Certainly, to thus advantage a lay-person would be indicated if there was an attorney-client relationship. It may even be required in a proper case, if the other party to the business transaction is not represented in the transaction by an attorney. Here, Richard S. Lerner was attorney for his brother Bernie, and for the contractor Taylor. And, it may be indicated or required if the nature of the transaction is such that the public is somehow

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Sec. 6103. "A willful disobedience or violation of an order of the court requiring him to do or forbear an act connected with or in the course of his profession, which he ought in good faith to do or forbear, and any violation of the oath taken by him, or of his duties as such attorney, constitute causes for disbarment or suspension."

Sec. 6106. "The commission of any act involving moral turpitude, dishonesty or corruption, whether the act is committed in the course of his relations as an attorney or otherwise, and whether the act is a felony or misdemeanor or not, constitutes a cause for disbarment or suspension. If the act constitutes a felony or misdemeanor, conviction thereof in a criminal proceeding is not a condition precedent to disbarment or suspension from practice therefor."

exposed and requires some protection; or, if there was a crime or if there is criminal conviction and criminal sanctions are imposed. See for example, *In Re Andreani* (1939) 14 Cal.2d 736, at page 749; *Werner v. State Bar* (1954) 42 Cal.2d 187, 265 P.2d 912; *Allen v. State Bar* (1962) 58 Cal.2d 912, 26 Cal.Rptr. 771. Here, the transactions were private, the disguised loans were designed to benefit Attorney Lerner's client-brother, Bernie, and his client, Taylor, There were no criminal implications. The act for which Petitioner is disciplined was not done in an attorney-client relationship. Accordingly, the cited Business and Professions Code provisions are inapplicable. But, once applied and relied upon, the Code must give way to federal preemption. There is no claim here that the State statute was in any way intended to hinder federal law. *Grimes v. Hoschler* (1974) 12 Cal.3d 305, 308-313. The Code does however conflict and it impermissibly conflicts since it is an obstacle to accomplishment of the Congressional purposes of 11 U.S.C. 523 and 524, *et seq. Perez v. Campbell* (1971) 402 U.S. 637, 29 L.Ed.2d 233.[9]

The decision appealed from affects all members of the Bar in non-client, non-practice related business activities. Certiorari is warranted therefore to resolve the various Constitutional guarantees that are in jeopardy as a result of the California Court's decision.

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[9]In the related Petition for Certiorari, this Court's Docket No. 87-691, the fact that Judge Russell arbitrarily imposed sanctions *solely because Petitioner is an attorney,* is further indicative of a willingness in some to ignore the reality of the business transaction, the lack of an attorney-client relationship and the fact that the businessman seated across the table was fully and adequately represented by counsel at all times in the transaction. Respondent's overzealous pursuit and *the knee-jerk response evidenced in the decision appealed from* perhaps explain this result, but it does not excuse the denial of Constitutional guarantees and the utter disregard of Petitioner's rights and the salient real-world facts.

The commentators do not deal with civil restitution as a matter of attorney supervision. It is extensively analyzed, however, as a function of harm to victims and criminal punishment giving added deterrent effect to the sanctions imposed after criminal conviction. See, Victim Restitution in the Criminal Process: A Procedural Analysis, 97 Harv.L.Rev. 931 (1984). This case does not, however, involve the State's interests in rehabilitation and punishment after trial by an Article III Court with Seventh Amendment and Fourteenth Amendment protections. *Kelly v. Robinson, supra.*

D. Factual Summary[10]

The Taylor Agreement was entered into in October 1977. At that time Lerner was Taylor's lawyer. Notes in red ink that Taylor made on the agreement submitted to the State Bar Panel were made after consultation with, and upon the advice of, his attorney, Lerner. The Lerner Agreement was entered into in December 1978. Petitioner was referred to Lerner for a loan by Taylor. Petitioner sought loan funds only, never had any partners during the course of developing numerous projects in Malibu and at all times used his own properties and substantial credit worthiness to secure loan funds for purchase and construction. Significantly, that was known to both Taylor and Lerner and to their attorney, Richard Lerner, and relied upon by them. Attorney Lerner was paid a "finders fee" of $10,000, out of loan proceeds, for the Lerner loan. Taylor and Lerner wanted a greater than 10% return on the monies loaned, however. As a consequence a disguised loan transaction was entered into with both in order to provide a percentage of the net profit realized by Petitioner rather than paying straight interest. (Appendix

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[10]Appendix H and Appendix I review the facts of record in greater detail.

E.) Those agreements were private, as between the parties, with no consequences to the public, and were not concluded to be in violation of law. (Appendix D.) At no time did Petitioner suggest or in any way seek to avail himself of any defenses of usury or in any way seek to avoid his obligations under the agreements to develop and sell his properties and share the profits according to the percentages agreed upon. Had either of those kinds of conduct occurred, discipline would be warranted. Furthermore, the decision below, while it notes as aforesaid the lack of credibility of the Lerners, it also fails to comment on Complainants' participation in these agreements. Arguendo, if there was an actionable deception, it was the contrivance of Attorney Lerner, participated in by the Complainants, who are restored the monies they loaned. In the context of unfairly advantaging one party to a business deal over another, that is the result below.

In late June of 1980 Attorney Lerner demanded on behalf of his clients either an equity interest in Petitioner's properties or a share of re-finance proceeds and, if that was not forthcoming, lawsuits were threatened in order to prevent refinance and completion of the Petitioner's construction projects. Petitioner harshly declined to be thus extorted. The threatened lawsuits were filed, spurious claims of partnership were made and on that basis writs of attachment were obtained thus bringing Petitioner's projects to a halt. Thereafter, in January 1981 Petitioner sought the protection of the Bankruptcy Court, filing a Chapter 11.[11]

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[11]During the reorganization proceedings, Petitioner's attempts to refinance and to market Petitioner's properties were thwarted by Complainants. (LA-81-00606) The Lerner Complainants objected to the refinance and Taylor moved to convert the Chapter 11 to a Chapter 7 liquidation. That especially defied reason and good business practice as it foreclosed their being paid a share of the profits

Subsequently, unsecured creditors of Petitioner learned of the claims of partnership by Lerner and Taylor. Those unsecured creditors filed involuntary petitions in bankruptcy against the purported Lerner/Galardi and Taylor/Galardi partnerhips.

In addition, the adversary proceedings for non-dischargeability determinations were commenced. The *Taylor* case was fully adjudicated on the merits and judgment was entered in favor of Petitioner (Appendix D). The *Lerner* case was tried and thereafter decided by a judge who did not conduct the trial and hear the evidence. That case is before this Honorable Court in Docket No. 87-691. The Involuntary Petitions were dismissed (Appendix F and Appendix G), because complainants (to the State Bar) denied and disavowed their earlier partnership claims.

Contemporaneous with the filing of the lawsuits in June, 1980, Complainants Lerner and Taylor sought to pursue their spurious claims of partnerhip and attorney-client relationship before the State Bar. Those complaints resulted in the decision here on appeal. While those assertions of partnerhip and joint venture were being made to the State Bar and were being investigated and heard by Respondent, Complainants Lerner and Taylor were denying partnership in the Bankruptcy Court.

REASONS FOR GRANTING CERTIORARI

The Supremacy Clause is a bar to re-litigation of the Taylor debt in the State Bar Court, or elsewhere. It is also a bar to finding there was a Lerner/Galardi partnership in view of the disposition of those issues by the Bankruptcy Court in dealing with the Involuntary Peti-

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and resulted in the Bank's taking the properties. It further evidenced the malice and motives of spite that governed their contrived actions. (Appendix J.)

tions filed by the unsecured creditors, and, in view of the statements under oath by Lerner that there was no partnership and that he only loaned money to Petitioner.

The Respondent relied upon the Business and Professions Code of the State of California, Sec. 6067 and 6068 and Sec. 6103 and 6106, and re-tried Complainants civil claims without regard to their prior disposition. Certiorari is warranted where, as here, federal questions involving both the Supremacy Clause and the Constitutional guarantees of Equal Protections are placed in jeopardy. Article 6, Clause 2; Fourteenth Amendment, Section 1.

The United States Bankruptcy Court discharged the debt created by the Taylor loan, and thus concluded pursuant to 11 U.S.C. Sec. 523(a)(2)(a), 523(a)(4) and 523(a)(6). (Appendix D.) The Bankruptcy Act preempts the body of State law, both statutory and the common law. That decision and judgment and the basis therefore cannot be collaterally attacked and it must, Petitioner submits, be accorded the Full Faith and Credit of a decision reached pursuant to the terms and provisions of 11 U.S.C. 523, *et. seq.* Article 4, Section 1.

ARGUMENT

I

CERTIORARI IS WARRANTED WHERE THE CALIFORNIA SUPREME COURT HAS DECIDED A FEDERAL QUESTION IN A WAY IN CONFLICT WITH THE SUPREMACY CLAUSE

The Bankruptcy Court discharged the debt created by the Taylor loan in a final decision after full adjudication on the merits. Certiorari is warranted where a State Court decision exempts a party, here the Respondent, from the provisions of 11 U.S.C. 524(a)(2)(1984). That statute provides, in part: "A discharge under this title-

(2) operates as an injunction against . . . an act, to collect, recover or offset any such debt as a personal liability of the debtor, whether or not discharge of such debt is waived."

It would appear also that pursuant to the provisions of 11 U.S.C. Section 524 (c) and (d) (1984) reaffirmation of discharged debts is strictly limited to agreements made prior to discharge and approved by the United States Bankruptcy Court. Because the Bankruptcy Act is specifically designed to give the debtor a "fresh start", 11 U.S.C., Section 524 (1984) provides, in part:

> "(A) Governmental unit may not deny, revoke, suspend, or refuse to renew a license . . . or other similar grant to, condition such a grant to, discriminate with respect to such a grant against, deny employment to, terminate the employment of, or discriminate with respect to employment against, a person that is or has been a debtor under this title . . . solely because such . . . debtor . . . has not paid a debt that is dischargable in the case under this title . . ."

See also, Senate Report No. 95-989, pages 6-7, 98 (5 U.S. Code Congressional and Administrative News (1978, 95th Congress, Second Session) pages 5792-5793, 5884); *Local Loan Co. v. Hunt* (1934) 292 U.S. 234, 244; *Bates v. State Bar of Arizona* (1977) 433 U.S. 350, 53 L.Ed. 810, 97 S.Ct. 2691.

By Respondent's thus proceeding pursuant to the provisions of the California Business and Professions Code with the result that the previously discharged (Taylor) debt is reinstated and the previously decided Lerner and Taylor partnership issues are ignored, both Respondent and the decision below have violated the Supremacy Clause. *Once decided and preempted by Federal Law, there*

is no subject matter jurisdiction in the State's judicial process to entertain re-litigation of those issues. (See generally, 16 Am.Jur.2d, Constitutional Law, Sec. 491.) And, because forcible reinstatement of the Taylor debt, for example, i.e. restitution, is a condition precedent to compliance, that is both violative of the Supremacy Clause and denies the Equal Protections of the Fourteenth Amendment.

Another important purpose of the Bankruptcy Act is the equitable distribution of the debtor's assets among creditors. Here, that purpose was violated by Respondent and by the Court below. House Report No. 95-595, pages 177-178, 186 (5 U.S. Code Congressional and Administrative News (1978, 95th Congress, Second Session) pages 6138-6139, 6147); *Palmer v. Radio Corporation of America* (1971) 453 F.2d 1133, 1140-1141. By reaching a result different than that reached in the Bankruptcy Court, Complainant Taylor is being granted *preferential treatment*, preferential over the relief accorded *other creditors* in those proceedings. Considering the Federal Court's disposition of the Taylor claim, *i.e. Taylor had no legal or equitable interest in the Petitioner's properties that comprised the estate or the borrowed funds secured by those properties*, (Appendix 4), relitigating those issues and reaching a different result affords Taylor creditor's rights heretofore denied Taylor and other creditors in the Bankruptcy Court. Clearly, a major purpose of the Bankruptcy Code, which is also carried forward from earlier law, is the equitable distribution of the debtor's assets among creditors. (See H.Rept. No. 95-595, pp. 177-178, 186 [5 U.S. Code Cong. & Admin. News (1978, 95th Cong., 2d sess.) pp. 6138-6139, 6147]; *Kuehner v. Irving Trust Co.* (1937) 299 U.S. 445, 451-452; *Louisville Bank v. Radford*, (1934) 295 U.S. 555, 587-588; *Palmer v. Radio Corporation of America* (1971) 453 F.2d 1133, 1140-1141.) The preemptive jurisdiction of the Bankruptcy Court is there-

fore a further bar to permitting creditors to re-litigate in other forums.

While the restitution of the Taylor funds might in a proper case be characterized as restoring damages resulting from either a tortious or contractual breach, i.e. actual pecuniary loss, to thus conclude is precluded however, as those matters have been conclusively litigated on the merits. The Federal Court found and concluded the allegations and claims of non-dischargability were not supported by the facts or the law. Furthermore, Petitioner submits there is no basis in this record to compel restitution as a matter of criminal sanctions as was the case in *Kelly v. Robinson, supra.* In that case, the Court faced the different, but relevant, question whether a criminal restitution order entered as a condition of probation prior to the filing of a bankruptcy petition was a dischargable debt. The court determined such order could not be discharged. (*Id.* at p.- (107 S.Ct. at pp. 362-363); see also *People v. Calhoun* (1983) 145 Cal.App.3d 568, 570-572; *People v. Washburn* (1979) 97 Cal.App.3d 621, 622-626.)

The focus of the Court's inquiry in *Kelly v. Robinson* was Sec. 523(a)(7) of the Bankruptcy Code, which protects from discharge any debt "... to the extent such debt is for a fine, penalty, or forfeiture payable to and for the benefit of a governmental unit, and is not compensation for actual pecuniary loss ..." (*Kelly v. Robinson, supra*- U.S. at p.- [107 S.Ct. at pp. 361-363].) The section was examined in light of historical application of the prior Bankruptcy Act and the interests of the States. (*Ibid.*)

The Supreme Court Noted:

> "Congress enacted the Code in 1978 against the background of an established judicial exception to discharge for criminal sentences, including restitution orders, an exception created in the face of a

statute drafted with considerable care and specificity." (*Id.* at p.- [107 S.Ct. at p.359].)

It recognized that "[t]he right to formulate and enforce penal sanctions is an important aspect of the sovereignty retained by the States" and in its view the congress would not ". . . lightly . . . limit the rehabilitative and deterrent options available to state criminal judges." (*Id.* at p.- [107 S.Ct. at pp. 360-361].)

With this in mind, the Supreme Court determined that neither of the qualifying phrases of section 523, subdivision (a)(7) permitted the discharge of criminal restitution orders because such orders ". . . operate 'for the benefit' of the State" and . . . are not assessed 'for . . . compensation' of the victim." (*Id.* at p.- [107 S.Ct. at pp. 362-363].) It reasoned:

> "The criminal justice system is not operated primarily for the benefit of victims, but for the benefit of society as a whole. Thus, it is concerned not only with punishing the offender, but also with rehabilitating him. Although restitution does resemble a judgment 'for the benefit of' the victim, the context in which it is usually imposed undermines that conclusion. The victim has no control over claiming payment or over the amount of restitution awarded or over the decision to award restitution. Moreover, the decision to impose restitution generally does not turn on the victim's injury, but on the penal goals of the State and the situation of the defendant. . .' Unlike an obligation which arises out of a contractual, statutory or common law duty, here the obligation is rooted in *the traditional responsibility of a state to protect its citizens by enforcing its criminal statutes and to rehabilitate an offender by imposing a criminal sanction intended for that*

purpose.' [Citation]") *Id.* at p.-[107 S.Ct. at p. 362]; see also *In Re Brian S.* (1982) 130 Cal.App.3d 523, 529; *People v. Richards* (1976) 17 Cal.3d 614, 620-622.) (emphasis supplied)

The Court further noted:

"Restitution is an effective rehabilitative penalty because it forces the defendant to confront, in concrete terms, the harms his actions have caused. Such penalty will affect the defendant differently than a traditional fine, paid to the State as an abstract and impersonal entity, and often calculated without regard to the harm the defendant has caused. Similarly, the direct relation between the harm and the punishment gives restitution a more precise deterrent effect than a traditional fine. [Citation]" (*Kelly v. Robinson, supra,* U.S. at p.-[107 S.Ct. at pp. 360-361, fn.10]; see also *People v. Richards, supra,* 17 Cal.3d at p.622.)

Where there is no crime, no criminal sanction, no attorney-client relationship, and no compelling rationale for rehabilitative or deterrent options, both the circumstances and due process require a more guarded approach. All persons therefore, excepting those sanctioned criminally, Petitioner submits, should have the protection intended in the Bankruptcy Act — all persons, including developers who happen also to be attorneys.

One of the primary purposes of the Bankruptcy Act which is continued from the former Code is to give the individual debtor a fresh start unhampered by the pressure and discouragement of preexisting debt. (See Sen. Rept. No. 95-989, pp. 6-7, 98 [5 U.S. Code Cong. & Admin. News (1978, 95th Cong., 2d sess.) pp. 5792-5793, 5884];

H. Rept. No. 95-595, pp. 125-126, 128, 175-176, pp. 6086-6087, 6089, 6136-6137, 6340]; *Perez v. Campbell, supra,* 402 U.S. at pp. 648, 660; *Local Loan Co. v. Hunt* (1934) 292 U.S. 234, 244; *Williams v. United States Fidelity & Guaranty Co.* (1915) 236 U.S. 549, 554-555; 11 U.S.C. Secs. 522, 524, 727.) A different result in the decision appealed from is therefore violative of the fresh start policy, generally, and the equitable distribution of assets, without preference, especially where the restitution gives both the appearance of and is, in fact, direct compensation for the claimed pecuniary loss. Equally important is the fact that re-litigation of the prior adjudication conflicts with the Supremacy Clause and the principles of res judicata, as hereinabove urged. The California court's conclusion that subject matter jurisdiction here preempted by the Supremacy Clause, can be waived, is therefore not constitutionally tenable.

Finally, while a discharge will not insulate a debtor from the consequences of pre-petition behavior, that is not, was not, and cannot be the issue here since the Federal Court ruled the pre-petition transaction with Taylor *did not consitute the partnership relationship alleged by Taylor and it did not substantiate the claims of legal or equitable interests in the Petitioner's property or loans made to Petitioner, secured by his properties.* (The result should be the same in Lerner [Supreme Court Docket #87-691]).

The Court is urged then to reverse the decision below as to the applicability of the Supremacy Clause, for two reasons:

1. Because the Federal Court decided there was no "Taylor/Galardi partnership."[12]

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[12]Appendix D to the Petition for Review, Appendix D here, paragraphs 5 through 9 of the Conclusions of Law. The decision

2. Because there in fact were *no conflicting interpretations* in the two prior Federal Court adjudications regarding the Taylor transaction and the Taylor/Galardi relationship;[13]

II

THE DECISION OF THE BANKRUPTCY COURT AS TO *TAYLOR V. GALARDI* IS RES JUDICATA; AND IT MAY NOT BE COLLATERALLY ATTACKED.

Where the prior judgment is a Federal judgment, as here, the res judicata effect, *Partmar Corp. v. Paramount Theaters Corp.* (1954) 347 U.S. 89, 98 L.Ed. 532, 74 S.Ct. 414, *reh den* 347 U.S. 931, 98 L.Ed. 1083, 74 S.Ct. 527, or its collateral estoppel effect, *Zdanok, v. Glidden Co.* (1964 CA 2) 327 F.2d 944, is governed by Federal law. That is especially true where a federal question, (here, the Bankruptcy Power) is involved. *Partmar Corp. v. Paramount Pictures Theaters Corp., supra.*

It would also appear that Federal law governs where there is an overriding federal interest in a uniform rule of decision, *Illinois v. Milwaukee* (1972) 406 U.S. 91, 31 L. Ed.2d 712, 92 S.Ct. 1385, (discharge of debts adjudicated after adversary proceeding, or creditor preferences, for example), or where the matters in issue are preempted by a body of federal law as in the provisions of the Bankruptcy Act and particularly 11 U.S.C., Sections 523 *et seq.* and 524 *et. seq.* (1984).

Apart from Supremacy Clause considerations, Taylor was a party to both bankruptcy proceedings and the

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referred to was marked as Exhibit K before the Hearing Panel. That adjudication was made after issue had been joined and was urged as a bar to re-litigating the Taylor debt, before the Panel. The Panel was also referred to the Lerner declaration disavowing partnership.

[13]Decision, II, A, contra. Appendix B; Appendix D; Appendix F.

Court's decision addresses matters already litigated and adjudicated on the merits as between Taylor and Galardi. (Appendix D; Appendix F.)

The fact that the State Bar was not a party in the Federal Court is not persuasive as the Respondent State Bar is in privity with and stands in Taylor's shoes on the limited issues of the *attorney-client relationship.* In any case, the decisions of the Bankruptcy Court are binding in all matters of that Court's exclusive jurisdiction. That concept is a matter of continuing legislative history in the Bankruptcy Act and the predecessor legislation, and it has received time honored judical acceptance without suggestion of any change in legislative intent. *Midatlantic Nat'l Bank v. New Jersey Dept. of Environmental Protection* (1986) 474 U.S. 494.

It is fair and reasonable to conclude that when Taylor, or anyone, seeks to use a complaint to the State Bar as an alternate means of resolving a business dispute, a civil claim, as it were, that party should be bound by ordinary rules of law, both substantive and procedural, including principals of res judicata, collateral estoppel, and exclusive jurisdiction. Accordingly, the Respondent State Bar should not be permitted to collaterally attack the earlier consistent adjudications as to that business relationship because of their res judicata effect. Nor should the California Supreme Court's looking behind the evidence ruled upon in motions adjudicated in Federal Bankruptcy Court be countenanced. See, (Appendix B.) The California Court did not believe Lerner was telling the truth in his sworn declaration. Unjustified reliance upon Complainants contrivances further justifies invoking the rule of Collateral estappel. See also, *Respondent's inconsistent findings adopted November 20, 1987.* (Appendix K.)

Petitioner submits, res judicata is not a mere matter of practice or procedure inherited from a more technical

time. A matter once litigated cannot be brought again into litigation between the parties to the controversy, or their privies, upon any ground whatsoever. *Dowell v. Applegate* (1984) 152 U.S. 237, 38 L.Ed. 463, 14 S.Ct. 611, enunciates that timeless principle. The rule is one of fundamental and substantial justice. It is a rule of both public policy and private peace and it is a rule, Petitioner submits, which should be enforced by this Court to the end that rights once established in a court of competent jurisdiction, here, the Federal Court, must be recognized by those, who are bound by that judgment in every respect. *Hart Steel Co. v. Railroad Supply Co.* (1917) 244 U.S. 294, 61 L.Ed. 1148, 37 S.Ct. 506. Here, complainants to the Respondent State Bar sought to use Respondent to again litigate their civil claims and the result below accorded them that right. That decision is in conflict with earlier decisions of this Honorable Court and resolution warrants the grant of Certiorari.

In essence then, the California Court ignored the mandate of Article 6, Clause 2, ignored the protection and guarantees of the Fourteenth Amendment, Section 1, and rejected the fundamental and substantial justice of *Dowell v. Applegate.*

Collateral Estoppel furthermore applies as a preclusive rule. Re-litigation of the same issues vis-a-vis the Taylor/Galardi transaction in a different cause of action or in a different forum is also precluded by rules of Collateral Estoppel. The doctrine is one of preclusive effect and therefore carries severe jurisdictional overtones. *Lawler v. National Screen Service Corp.* (1955) 345 U.S. 322, 99 L.Ed. 1122, 75 S.Ct. 865. The rule prevails where the parties or their privies have had a full and fair opportunity to litigate the basic issues that are essential to judgment. *Allen v. McCurry* (1980) 449 U.S. 90, 66 L. Ed.2d 308, 101 S.Ct. 411; *Partmar Corp. v. Paramount*

Pictures Theaters Corp., supra; Cromwell v. County of Sacramento (1877) 94 U.S. 351, 24 L. Ed. 195. Exhibit K before the Panel, Appendix 4 here, spells out Findings and Conclusions that were fundamental to the determination of the entire Taylor transaction. All certain and material points arising out of the allegations and contentions of Taylor in the suit (first instituted in June 1980) in the Superior Court and thereafter transferred to the Federal Court for trial, were fully litigated. Therefore, that constitutes a bar to re-litigation in these proceedings. *Paine & Williams Co. v. Baldwin Rubber Co.* (1940 CA 6) 113 F.2d 840.

The commentators affirm that further litigation is foreclosed because res judicata and collateral estoppel are essentially doctrines of preclusion. Examination clearly reveals the Taylor issues raised before the Panel, considered by the Review Department and ruled upon *de novo* below are identical to the issues actually litigated in the Federal Court. That adjudication was dependent upon the determination of the identical central issues re-litigated by Respondent. Petitioner submits to thus proceed is barred by both res judicata and collateral estoppel principles. See, Vestal, "The Constitution and Preclusion/Res Judicata, 62 Michigan Law Review 33 (1963); *Partmar Corp. v. Paramount Pictures Theaters Corp., supra; Southern Pacific Rail Co. v. United States* (1897) 168 U.S. 1. And, since the Federal Court decision concludes as a matter of law that Taylor had no legal or equitable interest in the Galardi properties or in the funds borrowed by Galardi, and concludes there was no misuse of funds and the debt was discharged, that judgment could not have been rendered without deciding those critical issues. *Hoag v. New Jersey* (1958) 356 U.S. 464, 2 L. Ed.2d 913, 78 S.Ct. 88829, *reh den*, 357 U.S. 933, 2 L. Ed.2d 1375, 78 S.Ct. 1366. The decision of the California

Supreme Court constitutes a departure from this Court's decisions as to res judicata and collateral estoppel.

Notably, the Bankruptcy Court also concluded Petitioner, at no time, was in an attorney-client relationship with Taylor and even the Lerners ultimately denied an attorney-client relationship existed.

III

ABSENCE OF FIDUCIARY RELATIONSHIP AS TO EITHER *TAYLOR* OR *LERNER* IS RES JUDICATA.

Construction of the writings as of the time and in the circumstances the writings were made requires the conclusion that no partnership of any kind was intended by the parties or created thereby.

Petitioner submits it is necessary to construe both writings as of the time they were entered into.

That is true certainly as to the laws which subsist at the time and place of the making of the contract. *United States Trust Co. v. New Jersey* (1976) 431 U.S. 1, 19-20, 52 L. Ed.2d, 108, 97 S.Ct. 1505; *C.I. Engineers & Constructors, Inc. v. Johnson & Turner Painting Co.* (1983) 140 Cal.App.3d 1011, 189 Cal.Rptr. 824. And, that must certainly be the rule of construction applied here in taking cognizance of the parties' intentions, their respective positions and their objectives, at the time they made their agreement. Here, hindsight assessment of Complainants' claims made under questionable circumstances after their deal went sour, cannot reasonably be substituted for a full and fair evaluation of what the parties expected both in profits, participation and performance. Neither Lerner nor Taylor were "buying" partnership risks, exposure or liabilities. Clearly, there was no limited partnership established. They wanted *then*, only to be lenders. That was the proof offered by Lerner in his sworn declaration. That

was the proof in *Taylor v. Galardi* and the result should not be different when they come back for a contrived second bite of the apple with the complaints to the Respondent State Bar. To thus permit Respondent to foster the improper motives, the inherent malice and the misleading contrivances of attorney Lerner and ignore the plain real-world reality of what was intended and what happened, is *an unreasonable knee-jerk response to Petitioner's being a member of the Bar.* It also suggests there is neither a collateral estoppel nor res judicata effect and that ignores the fundamental tests:

1. Was the prior decided issue identical;

2. Was there a final judgment; and,

3. Were the parties in privity? See 57 Harv.L.Review 98; 56 Cal.L.Rev. 1098; 53 Cal.L.Rev. 25; 9 Stanf.L.Rev. 28; Rest.2d, Judgments Sec. 29; 31 A.L.R.3d 1068; 34 A.L.R.3d 518. Research reveals no cases where civil claimants *who have sued and lost, become complainants to the State Bar and thereby successfully reverse the earlier adjudicated result.* Here, Respondent relies on the same claims presented to the Federal Court. Therein lies the privity.

IV

THE BANKRUPTCY COURT DECISION IN *TAYLOR V. GALARDI* IS ENTITLED TO FULL FAITH AND CREDIT PURSUANT TO ARTICLE IV, SECTION 1.

Finally, a second look at the decision in *Taylor v. Galardi* persuasively demonstrates the decision settled all ultimate issues of fact and law requiring decision between the parties. The decision did not involve only "mediate datum" and it should therefore be given Full Faith and Credit. U.S. Constitution, Article 4, Section 1;

The Evergreens v. The Nunan (1944, CA 2) 141 F.2d 927, *cert. den.,* 323 U.S. 720, 89 L.Ed. 579, 65 S.Ct. 49.

Judge Learned Hand's rationale in *The Evergreens* case is applicable here. The Taylor transaction cannot be construed in the State Court or in any forum as a joint venture or partnership in view of the Findings and Conclusions in *Taylor v. Galardi.*

SUMMARY OF ARGUMENT

CERTIORARI SHOULD BE GRANTED

The decision of the California Supreme court is in conflict with decisions of the Bankruptcy Court on the same issues and as between the same parties, in this case, Respondent standing in privity with Complainants.

The Court below has ruled Petitioner "waived" the protection of the Supremacy Clause, which would deny the State Court the opportunity to find and conclude there were partnerships and consequent fiduciary duty, or conclude Complainant Taylor had any more or different rights than those discharged by the Federal Court. And, thus declining to invoke the Supremacy Clause, the decision below has resulted in a denial of Equal Protections and a denial of the due process guaranteed by the Fourteenth Amendment, Section 1. In any case, and apart from the controlling aspects of the Supremacy Clause, the decision in the Bankruptcy Court as to the Taylor claim, and in all respects with regard to matters of exclusive jurisdiction over the issue of dischargability, is entitled to Full Faith and Credit pursuant to Article IV, Section 1.

Furthermore, Respondent stands in privity to Complainants, and the nature of the disposition of issues critical to and identical with those pursued by Respondent compel the conclusion that re-litigation of those

issues is barred by the preclusive rules of res judicata and collateral estoppel.

Finally, Constitutional guarantees to all members of the bar functioning in non-client, non-practice related business activities are placed in jeopardy by virtue of the decision of the California Court and Certiorari is warranted in order to afford and protect those Constitutional guarantees.

CONCLUSION

For the foregoing reasons, Petitioner respectfully submits this Petition for Writ of Certiorari should be granted.

DATED: November 30, 1987

Respectfully submitted,

LAWRENCE J. GALARDI
Petitioner and A Member of the Bar

APPENDIX A

ORDER DENYING REHEARING

IN THE SUPREME COURT OF
THE STATE OF CALIFORNIA

IN BANK

LOS ANGELES NO. 32184

LAWRENCE GALARDI,
Petitioner,

VS.

STATE BAR OF CALIFORNIA,
Respondent.

Supreme Court Filed: September 21, 1987,
Laurence P. Gill, Clerk.

Petition for Rehearing DENIED.

LUCAS
Chief Justice

APPENDIX B

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

LOS ANGELES NO. 32184

LAWRENCE J. GALARDI,
Petitioner,

VS.

THE STATE BAR OF CALIFORNIA,
Respondent.

Supreme Court Filed: August 3, 1987

Laurence P. Gill, Clerk.

BY THE COURT:

This is a proceeding to review a recommendation of the Review Department of the State Bar Court that petitioner be ordered suspended from the practice of law for three years, that execution of that order be stayed, and that he be placed on three years' probation with certain conditions, including actual suspension for at least one year and until petitioner pays restitution totalling $186,000 to his joint venturers in various real estate investment projects. The hearing panel had proposed the more lenient sanction of private reproval. We shall conclude that the circumstances of this case warrant 30 days of actual suspension, 5 years of probation and restitution.

I

Petitioner, who was admitted to practice in California in 1971 and in New York in 1959, has no prior record of discipline.

Petitioner entered into two joint venture agreements, one with Bernie L. and the other with John T., to improve and sell two parcels of real estate in Malibu, California.

Eventually, both properties were foreclosed, John T. and Bernie L. lost their investments, and petitioner filed for bankruptcy in the United States Bankruptcy Court.

In both matters, the hearing panel (panel) and review department (department) concluded that while no attorney-client relationships existed, petitioner had entered into joint venture agreements and had willfully breached fiduciary duties he owed to his coventurers.

A. THE JOHN T. MATTER

The panel and department found that in October 1977, petitioner and John T. entered into a joint venture agreement to improve and sell real property on Eagle Pass Avenue in Malibu. Under the contract, petitioner, owner of the Eagle Pass property, promised to obtain construction financing and to sell the property once improvements were complete. John T., a contractor, invested $85,000 in the joint venture, and "[i]n consideration of said payment" petitioner promised to share with him profits from the sale of the property. John T. also agreed to perform certain construction work at the Eagle Pass property and at two other parcels owned by petitioner on Big Rock Drive and Selfridge Drive in Malibu. The fees for these construction services were negotiated in separate contracts.

The panel determined that petitioner, without John T.'s knowledge or consent, encumbered the Eagle Pass property with two loans, totalling $120,000 and $500,000,[1] respectively, and that the proceeds from these loans were used for nonventure purposes, including petitioner's liv-

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[1]The $500,000 loan was secured by a deed of trust encumbering the Eagle Pass property in the sum of $400,000 and other Malibu property located on Bansall Drive in the sum of $100,000. John T. had no interest in the Bonsall property, which was the subject of the joint venture agreement between petitioner and Bernie L.

ing expenses. The department agreed with these findings and further determined that John T. had no knowledge of and did not consent to a $30,000 encumbrance, a portion of which petitioner diverted to his personal use.

B. THE BERNIE L. MATTER

Bernie L. was introduced to petitioner by his brother, Richard L., and became interested in investing in one of petitioner's real estate deals. Richard L., an attorney, negotiated for two months with petitioner on his brother's behalf, and in late 1978, Bernie L. and petitioner entered into a written joint venture agreement to purchase, improve and resell property on Bonsall Drive in Malibu. Bernie L. invested $101,000 in the joint venture.

Petitioner agreed to obtain fiancnaing and to supervise the remodelling and sale of the property. He also promised to pay property taxes and all costs and interest related to the financing. By the terms of the joint venture agreement, petitioner expressly promised to act as Bernie L.'s fiduciary and to obtain his consent before encumbering or selling the property; all construction financing was to be spent only on the Bonsall project.

In analyzing the various loans secured by the Bonsall property, the panel found that petitioner used portions of a $250,000 encumbrance and a $500,000 loan (previously discussed in connection with the John T. matter) for joinventure purposes. The department concurred, and additionally determined that all of a $50,000 encumbrance and some of a $60,000 loan were used to pay for petitioner's personal expenses. The department further concluded that all four loans were procured without Bernie L.'s consent and that petitioner had refused to furnish an accounting of funds secured by the Bonsall property; whereas, the panel had found that the $500,000

encumbrance was obtained without the knowledge or consent of petitioner's conventurer.

The department delineated the following aggravating factors in both matters: (1) petitioner willfully and deliberately breached obligations he owed to his coventurers: (2) despite petitioner's willful and deliberate wrongdoing, he denied culpability and failed to appreciate his fiduciary obligations; and (3) the diversion of loan proceeds to his personal use "constituted a conversion of joint venture assets." As a result, the department concluded petitioner committed acts involving moral turpitude.

II.

It is well settled that this court must independently examine the evidence and pass upon its sufficiency in attorney discipline matters. (Alberton v. State Bar (1984) 37 Cal.3d 1, 11.) Furthermore, we must resolve all reasonable doubts in favor of the attorney. (*Ibid.*) However, the findings of the State Bar Court are entitled to great weight (*Id.* at p. 12; accord Himmel v. State Bar (1971) 4 Cal.3d 786, 794), and are presumed to be supported by the record (Bus. & Prof. Code, § 6083, subd. (c)).

As we have often observed, the petitioner bears the burden of demonstrating that the findings of the State Bar are not supported by the evidence (Trousil v. State Bar (1985) 38 Cal.3d 337, 341.): "In meeting this burden, the petitioner must demonstrate that the charges of unprofessional conduct are not sustained by convincing proof and to a reasonable certainty. [Citation]" (*Himmel*, supra, 4 Cal.3d at p. 794.) In this case, neither petitioner nor amicus appearing in his support, has met that burden.

A. JOINT VENTURES OF LOANS

Petitioner and amicus claim the agreements were characterized as joint ventures to conceal the fact that Bernie L. and John T. were loaning petitioner money at usurious rates of interest. In his brief, petitioner characterizes the Bernie L. Contract as a "sham" agreement. Even if we were persuaded by his factual claim, petitioner could not escape discipline. Such sham agreements involve deception, which would warrant substantial sanction by the State Bar.

Moreover, we find implausible the claim that petitioner was forced to sign the agreements because he had no other source of funds for escrows on the properties which were about to close. After the escrows closed, he was able to obtain many bank loans encumbering the properties. Indeed, petitioner, who successfully developed numerous other parcels in the Malibu area, testified that he had an excellent credit rating with local banking institutions. Furthermore, petitioner drafted the John T. agreement, and he negotiated for two months with Richard L. before entering into the contract with Bernie L. These facts significantly undermine his assertion that he was forced into signing the agreements due to his inability to garner financing before the impending escrow closings.

Conflicting testimony was elicited at the hearing as to whether the parties intended their agreements to be joint ventures or mere loans. As we have often stated, however, we are reluctant to disturb the panel's resolution of conflicting testimony, because it "has the opportunity to observe first-hand the demeanor of the witnesses and can better evaluate the veracity of their testimony. [Citation.]" (Baranowski v. State Bar (1979) 24 Cal.3d 153, 162.) This principle is especially applicable in a case where, as here, the documentary evidence does not support petitioner's version of the facts.

The written contracts — both signed by petitioner — repeatedly characterize the agreements as joint ventures. The contracts provide for a sharing of "net profits" between petitioner and his coventurers. Nowhere in the documents are the payments from John T. and Bernie L. characterized as loans. Furthermore, petitioner admitted that he had written the following notation on a check: "112 Bonsall Joint Venture — Galardi/[L.]"

Petitioner and amicus point to the many bankruptcy proceedings in this case for support for the proposition that petitioner merely borrowed money and did not enter into joint venture agreements with Bernie L. and John T. The State Bar, however, was not a party to the bankruptcy actions, and as such is not bound by the findings or conclusions of the bankruptcy courts. (See 7 Witkin, Cal. Procedure (3d ed. 1985) Judgment, § 299, pp. 737-738 and cases cited.) Furthermore, various bankruptcy courts in this matter have arrived at conflicting interpretations of the agreements signed by petitioner and his conventurers, making reliance on the conclusions of any one bankruptcy judge problematic.

We also conclude that the panel's finding that a joint venture existed between Bernie L. and petitioner is not seriously undermined by the fact that Bernie L. declared to the bankruptcy court that he had "agreed to lend" petitioner $101,000 and that he was not petitioner's partner. Reviewing the record as a whole, we conclude that the panel correctly discounted the probative value of the bankruptcy declaration. Given the vast amount of evidence that the parties intended a joint venture, the panel properly might have concluded that Bernie L. was not being candid when he made the declaration.[2]

---

[2]In any event, even if we felt Bernie L. was truthful in his declaration, petitioner could still be subject to discipline. Proving a

Petitioner suggests that, as a matter of law, no joint ventures existed because: (1) he held sole title to the two properties; (2) the agreements contained no express provision for sharing losses; and (3) he did the entire development work while John T. and Bernie L. only contributed money to the enterprise.

His argument is groundless. A joint venture "may exist although the property forming the capital of the adventure is not jointly owned by the parties [citation] and although one of the parties contributed money, another property and another skill to the enterprise. [Citation.] . . . In addition, the omission of a provision for the sharing of losses in a joint venture is immaterial. . . ." (Stilwell v. Trutanich (1960) 178 Cal.App.2d 614, 619.)

B. BREACH OF FIDUCIARY DUTIES

Likewise, there is no merit in petitioner's contention that he owed no fiduciary duties to Bernie L. and John T. Petitioner stresses the fact that the State Bar found no attorney-client relationship between himself and either Bernie L. or John T. However, it is well settled that an attorney may be disciplined for breach of a fiduciary duty owed to a nonclient. (Worth v. State Bar (1976) 17 Cal.3d 337, 341.) It is equally well established that a joint venturer owes fiduciary duties to his coventurers. (Boyd v. Bevilacqua (1966) 247 Cal.App.2d 272, 290.) Thus, by virtue of his status as a joint venturer petitioner owed fiduciary duties to John T. and Bernie L. Furthermore, as previously noted, the Bernie L. agreement expressly pro-

vides that the parties intended that petitioner act as Bernie L.'s fiduciary.

Petitioner's alleged breaches of fiduciary duty fall into three categories. We see no reason to disturb the State Bar's finding that he willfully breached the fiduciary duties he owed to John T. and Bernie L.

1. Diversion of Funds

Petitioner admitted at the hearing that he used funds from loans secured by the Eagle Pass and Bonsall properties for purposes unrelated to the joint ventures. He provides no evidence to support his assertion that the parties agreed he was free to divert funds to his own use because he was earning no salary while he managed development of the properties.

Amicus points to John T.'s testimony that he owned various properties and had leveraged them to finance development of the parcels, as well as to pay for his living expenses. But the fact that John T. pursued such a practice with regard to his own parcels does not indicate that he agreed to allow petitioner to do the same with regard to funds secured by joint venture property.

Futhermore, there is no merit in amicus's claim that the State Bar's accounting of the $120,000 loan is "unfair" to petitioner. Apparently, petitioner used these funds to pay off a loan encumbering his property on Big Rock Drive. Amicus claims this use of the $120,000 directly benefitted John T. because he had contracted to perform construction services on the site, and that it indirectly benefitted him to the extent that any development at Big Rock would enhance the value of the neighboring Eagle Pass property. But no work was ever started at Big Rock, apparently because the relationship between petitioner and John T. had disintegrated. Thus, John T. never realized

even the speculative benefit from this loan urged by amicus.

2. Failure to Obtain Consent to Borrowings

Petitioner also quarrels with the State Bar's findings that he neglected to notify or obtain the consent of John T., and failed to procure Bernie L.'s consent, before taking out various loans encumbering the properties. Again, we adopt the State Bar's resolution of the conflicting testimony.

The department made findings regarding various loans not discussed by the panel. It is true that the department merely reviewed the hearing transcripts and did not view the witnesses as they testified. Thus, the department was in no better position than this court to resolve conflicting testimony. However, our review of the record reveals no reason why the testimony regarding the various loans should be distinguished. The panel doubted petitioner's sincerity with regard to certain encumbrances, and it was reasonable for the department to conclude his testimony with regard to various other loans was not credible. The recap of the testimony provided by petitioner and amicus does not persuade us to amend these findings.

Amicus correctly states that the written terms of the agreement between petitioner and John T. did not require that petitioner inform his converturer before mortgaging the Eagle Pass property. However, petitioner's obligation to inform John T. arose from his duties as fiduciary. Petitioner owed the same fiduciary duties to his coventurer that a partner owes to his fellow partners. (Nielsen v. Wong (1960) 182 Cal.App.2d 582, 586.) It is undisputed that a partner has no right to use partnership property for purposes unrelated to the partnership. (Prince v. Harting (1960) 177 Cal.App.2d 720, 727.) Furthermore, " 'every partner is bound to act in the

highest good faith to his copartner and may not obtain any advantage over him in the partnership affairs by the slightest misrepresentation [or] concealment. . . .' [Citations.]" (*Ibid.*, quoting Llewelyn v. Levi (1909) 157 Cal. 31, 37.) Here, petitioner used the Eagle Pass property to secure financing to pay for expenses unrelated to the joint venture. By failing to notify and obtain the consent of John T. before encumbering that property with these loans, petitioner breached his fiduciary obligations.

Amicus also stresses the fact that the department did not find Bernie L. was unaware of any loans encumbering the Bonsall property. However, assuming arguendo that Bernie L. knew of these loans, petitioner still is subject to discipline because he failed to obtain Bernie L.'s consent, as required by both the express terms of the written agreement and the fiduciary relationship between the parties.

3. Lack of Accountings

The department properly found that petitioner did not comply with Bernie L.'s request for an accounting of loan proceeds. Petitioner offers no evidence to substantiate his claim he provided accountings, and at the hearing petitioner admitted that he never rendered the requested accountings.

Likewise, amicus erroneously asserts the record reveals petitioner provided Bernie L. with adequate accountings. Bernie L. did testify that petitioner showed him a piece of paper with handwritten notations indicating that approximately $68,000 had been spent on pool construction and other improvements. Finding this "accounting" inadequate, Bernie L. requested a complete and accurate accounting within 14 days. Petitioner did not comply. Moreover, assuming arguendo that petitioner provided a sufficient accounting of the $68,000, he never accounted

for the balance of the loans encumbering the Bonsall property.

C. DISCIPLINE

As we have frequently noted, the department's proposal of discipline is entitled to greater weight than that of the panel. (Warner v. State Bar (1983) 34 Cal.3d 36, 42; Garlow v. State Bar (1982) 30 Cal.3d 912, 916.) It is well established, however, that we render the "ultimate determination" regarding discipline. (McCray v. State Bar (1985) 38 Cal.3d 257, 272.) In this case, there is a sizable disparity between the discipline recommendation of the panel and that of the department. While we agree with the department that the panel's recommendation of private reproval is too lenient, we nonetheless conclude that the department's discipline proposal is too harsh.

Apart from the instant proceedings, petitioner's 28-year legal career is unblemished. Petitioner, who has held various positions of responsibility with the United States Department of Justice, has devoted extracurricular effort to the advancement of his profession. He is a member of numerous professional organizations and has taught and lectured extensively on topics related to his fields of expertise. Here, the misconduct occurred in the course of petitioner's business dealings and not during his representations of legal clients. In an appropriate case, the lack of prior discipline may constitute a significant mitigating factor. (Chefsky v. State Bar (1984) 36 Cal.3d 116, 132, fn. 10.) We find that this is such a case.

In addition, we are concerned that the department's recommendation that petitioner be actually suspended from practice *until* he repays his conventurers would prevent him from ever returning to the practice of law. It is unlikely that petitioner, who has gone through bankruptcy liquidation proceedings, would be able to comply

with the restitution requirement if he were unable to practice law. Amicus suggests that petitioner should repay the money that John T. and Bernie L. contributed to the real estate ventures, and that it would be reasonable to expect that petitioner could do so within five years. We agree.

Accordingly, in light of the foregoing concerns regarding petitioner's ability to make restitution, the nature of his misconduct, and his otherwise unblemished record of legal service, we order that petitioner be suspended from the practice of law for one year, and that execution of suspension be stayed and petitioner be placed on probation for five years with actual suspension for the first 30 days of the probationary period. The conditions of probation are that petitioner (1) pay restitution of $101,000 to Bernie L. and $85,000 to John T.,[3] and that one-fifth of the restitution shall be paid to Bernie L. and John T. each year for the next five years, with the first installments due one year after this decision becomes final and the remaining installments due on the same date in each subsequent year during the five-year probationary period; (2) comply with the State Bar Act and Rules of Professional Conduct of the State Bar of California; and (3) submit to the supervision of a State Bar probation monitor and comply with the reporting requirements, as described in the department's discipline recommendation. We further order that petitioner take and pass the Professional Responsibility Examination within the first year of probation.

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[3]In his brief, amicus argues that because the $85,000 debt was discharged in bankruptcy, restitution to John T. is barred by the supremacy clause of the United States Constitution. (U.S. Const., art. VI.) Petitioner has not objected to the State Bar's restitution recommendation on this ground, and thus he has waived any objection to restitution based on the supremacy clause.

GALARDI v. STATE BAR

L.A. 32184

COUNSEL FOR PARTIES

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APPENDIX C

STATE BAR COURT
STATE BAR OF CALIFORNIA
DISTRICT SEVEN

CASE NUMBER: 82-0-212 LA (LA 3669)

In the Matter of

LAWRENCE J. GALARDI,
a member of the State Bar

DECISION:

The above-entitled matter came on regularly for hearing on July 8, 1983, September 15, 1983, September 16, 1983, July 20, 1984, August 27, 1984 and November 14, 1984. Present at each of said hearing were the members of the hearing panel, Melvin W. Miller, Esq., principal referee and Henry E. Vagt, non-lawyer referee. The State Bar of California was represented by its examiner, Peter Appleton, Esq. The Respondent, Lawrence J. Galardi was present and represented himself.

The hearing of July 8, 1983 was reported by Marion Farrell Miller, C.S.R. No. 359; the hearing of September 15, 1983 was reported by Gail H. Predac, C.S.R. No. 6178 the hearing of September 16, 1983 was reported by Gail H. Predac, C.S.R. No. 6178; the hearing of July 20, 1984 was reported by Mavis E. Theodorou, C.S.R. No. 2812; the hearing of August 27, 1984 was reported by Mavis E. Theodorou, C.S.R. No. 2812; and the hearing of November 14, 1984 was reported by Mavis E. Theodorou, C.S.R. No. 2812.

After the close of the evidentiary hearings, the State Bar and the Respondent, each filed briefs in said regard. In addition, the Respondent filed a document entitled "Motion to Dismiss; or in the Alternative to Declare a

Mistrial" in regard to an exhibit which was attached to the reply brief of the State Bar. The hearing panel rejected any offer of evidence submitted after the close of the evidentiary hearings which may have been included or attached in the briefs submitted by the parties and such offers of evidence were not considered by the panel in its review and decision of this matter. Accordingly, the Respondent's "Motion to Dismiss; or in the Alternative to Declare a Mistrial" is denied.

The hearing panel makes the following Findings of Fact:

FINDINGS OF FACT IN REFERENCE TO COUNT ONE

I

The Respondent, Lawrence J. Galardi, was admitted to the practice of law in the State of California on May 14, 1971, and is and at all times herein mentioned, was a member of the State Bar of California.

II

There was no attorney-client relationship between Respondent, Lawrence J. Galardi and Bernie Lerner.

III

At or about December 1, 1978, Respondent, Lawrence J. Galardi entered into a Joint Venture Agreement with Bernie Lerner for the purchase, improvement and resale of certain real property located at 6112 Bonsall Drive, in Malibu, California.

IV

On December 1, 1978, Respondent, Lawrence J. Galardi received from Bernie Lerner the sum of $91,000.00 as Mr. Lerner's investment in the Joint Venture.

V

Pursuant to the terms of the Joint Venture Agreement, Respondent, Lawrence J. Galardi agreed:

(1) To acquire title to the Bonsall Drive property; within six (6) months thereafter to secure "the sum of at least $100,000.00 borrowed funds" to finance the remodeling of the Bonsall Drive property;

(2) To be responsible for and to pay without reimbursement from the proceeds or profits of the Joint Venture all costs, interest and charges relating to purchase money financing, construction financing and real property taxes of the Bonsall Drive property from the date of its purchase to its resale;

(3) To obtain all remodeling plans and permits and to be responsible for seeing to the completion and resale of the project;

(4) To purchase, improve and resell the Bonsall Drive property for the benefit of Respondent, Lawrence J. Galardi and Bernie Lerner;

(5) To obtain necessary financing to purchase and improve the Bonsall Drive property;

(6) To obtain the written consent of Bernie Lerner before selling the Bonsall Drive property except in the event that the property should re-sell for a gross amount in excess of $650,000.00 cash, in which

event only prior notice and no written consent would be necessary;

(7) To obtain the consent of Bernie Lerner before encumbering the Bonsall Drive property;

(8) To use any and all proceeds of loans secured by the Bonsall Drive property for the purchase or improvement of the Bonsall Drive property.

VI

Pursuant to the terms and conditions of the Joint Venture Agreement dated December 1, 1978, Respondent, Lawrence J. Galardi was a fiduciary of Bernie Lerner in reference to Bernie Lerner's investment and the management of the Joint Venture project.

VII

On or about February 1, 1980, without the knowledge or consent of Bernie Lerner, Respondent, Lawrence J. Galardi executed and delivered a Deed of Trust on the Bonsall Drive property in favor of a lender as a security for a loan in the sum of $500,000.00.

VIII

Respondent, Lawrence J. Galardi utilized a portion of the proceeds of the $500,000.00 loan and the $250,000.00 loan for purposes other than the purchase or improvement of the Bonsall Drive property.

IX

By virtue of the aforesaid conduct, Lawrence J. Galardi willfully breached his fiduciary duty to Berlie Lerner in reference to the Joint Venture Agreement.

FINDINGS OF FACT IN REFERENCE TO COUNT TWO

X

On October 6, 1977, Respondent, Lawrence J. Galardi entered into a Joint Venture Agreement with John Taylor for the improvement and sale of certain real property located on Eagle Pass Avenue in Malibu, California.

XI

There was no attorney-client relationship between the Respondent, Lawrence J. Galardi and John Taylor.

XII

Pursuant to the terms of the Joint Venture Agreement, Respondent, Lawrence J. Galardi agreed:

(1) To encumber the eight (8) acre Eagle Pass property by a construction loan in the amount of approximately $240,000.00 in addition to the existing Trust Deed in the amount of $100,000.00 that "will be subordinated to the construction loan";

(2) To use the proceeds of the construction loan for the improvement of the Eagle Pass property;

(3) To sell the property and improvements that were the subject of the Joint Venture Agreement and to share the net profits therefrom.

XIII

Respondent, Lawrence J. Galardi received the total sum of $85,000.00 from John Taylor as his investment pursuant to the Joint Venture Agreement.

XIV

Pursuant to the terms of the Joint Venture Agreement, Respondent, Lawrence J. Galardi was a fiduciary of John Taylor in reference to the management of Mr. Taylor's investment in the Joint Venture.

XV

Respondent, Lawrence J. Galardi without the knowledge or consent of John Taylor executed and delivered two Deeds of Trust on the Eagle Pass Drive property in favor of lenders as security for two loans in the sum of $120,000.00 and in the sum of $500,000.00 respectively.

XVI

Respondent Lawrence J. Galardi willfully utilized a portion of the loans in the sum of $120,000.00 and $500,000.00 for purposes other than the improvement of the Eagle Pass Drive property.

XVII

By reason of the aforesaid conduct, Respondent Lawrence J. Galardi willfully breached his fiduciary duty to Mr. John Taylor.

ACTION RECOMMENDED TO BE TAKEN

The hearing panel recommends that the Respondent shall be privately reproved.

DATED: July 26, 1985.

MELVIN W. MILLER
Principal Referee

HENRY E. VAGT
Referee

APPENDIX D

FINDINGS OF FACT AND CONCLUSIONS OF LAW

UNITED STATES BANKRUPTCY COURT
CENTRAL DISTRICT OF CALIFORNIA

CHAPTER 7, NO. LA 81-00606-RS

CONSOLIDATED ADVERSARY
NO. LA 81-0653-RS
NO. LA 81-5220-RS

DATE: NOVEMBER 2, 3 & 4, 1983
TIME: 9:30 O'CLOCK A.M.
COURT: "G", 9TH FLOOR

IN RE:
LAWRENCE J. GALARDI, dba
LAWRENCE J. GALARDI,
A Professional Corporation, and
SHARI J. GALARDI,
Debtors.

JOHN TAYLOR, An Individual,
JOHN TAYLOR, dba LONDON ELECTRIC COMPANY,
and LONDON CONSTRUCTION, LIMITED,
A California Corporation,
Plaintiff,
VS.
LAWRENCE J. GALARDI, dba
LAWRENCE J. GALARDI,
A Professional Corporation, and
SHARI J. GALARDI,
Defendants.

FILED: DECEMBER 12, 1983
CLERK, U.S. BANKRUPTCY COURT,
CENTRAL DISTRICT OF CALIFORNIA
BY ALG, BANKRUPTCY CLERK

The matter of the within Adversary Proceeding came on regularly for trial before the undersigned Bankruptcy Judge in Courtroom "G", 9th Floor, United States Courthouse, 312 North Spring Street, Los Angeles, California on November 2, 3 and 4, 1983. Plaintiff appeared by counsel MARC ZEGAR; Defendants appeared through counsel SULMEYER, KUPETZ, BAUMANN & ROTHMAN by MAX RUSH; the Court determining that no Pre-Trial Order governed this proceeding, the parties made certain stipulations in open Court; witnesses were sworn and testified; the Plaintiff having rested; and the Defendants having made a Motion to Dismiss under the provisions of F.R.C.P. 41(b), the Court makes the following Findings of Fact and Conclusions of Law:

FINDINGS OF FACT

1. On or about October 6, 1977 the parties entered into an Agreement (Plaintiff's Exhibit "1" herein).

2. At all times relevant hereto LAWRENCE J. GALARDI was the owner of the real property referred to in Plaintiff's Exhibit "1".

3. At the time of said Agreement, a First Trust Deed existed in the principal amount of approximately $100,000.00.

4. At the time of the execution of the Agreement (Plaintiff's Exhibit "1") Plaintiff LONDON ELECTRIC COMPANY, transmitted $15,000.00 to Lawrence J. Galardi and thereafter an additional $70,000.00, all in accordance with the Agreement.

5. The "red" writing on Plaintiff's Exhibit "1" was placed thereon by John Taylor after he executed the Agreement and following a discussion with his attorney, RICHARD LERNER. The writing in "red" is not a part of the Agreement. The other hand-written contents of

Exhibit "1" was negotiated between the parties prior to the execution of the Agreement and it is a part of the Agreement.

6. At all times relevant hereto Lawrence J. Galardi was an attorney at law duly admitted to practice in California. The Agreement, Plaintiff's Exhibit "1", was drafted by him. At no time relevant hereto was Lawrence J. Galardi attorney for any of Plaintiffs and he never so acted.

7. On or about May 1, 1978, Plaintiffs and Defendant Lawrence J. Galardi entered into a Building Construction Contract (Defendant's Exhibit "A" herein).

8. Substantial costs of construction were disbursed directly through payments from TOKAI BANK. Plaintiff's Exhibit "2" is a disbursement sheet of payments of Tokai Bank.

9. The cost of construction as of July, 1980 is in the amount of not less than $732,139.00.

10. From the time of execution of this Agreement until February 15, 1980, the Debtor borrowed the principal sum of $1,300,000 secured by the subject real property. There is other property securing the first $800,000.00 of such loans.

11. The debtor used loan proceeds as hereinabove stated, secured by the subject real property for purposes other than the construction and improvement of said property.

12. The construction has not been completed. There are no profits under the terms of the Agreement.

13. Few if any improvements were made to the property by the Debtor after July, 1980.

14. At the time the parties entered into the Agreement, Plaintiff's Exhibit "1", Lawrence J. Galardi represented to John Taylor that Plaintiffs would be paid pursuant to the terms of said Agreement from the proceeds of the sale of the subject real property.

15. Plaintiffs offered no evidence that the named Defendant, SHARI J. GALARDI, was involved in, participated in, or was connected in any way whatsoever directly or indirectly with the transaction alleged in this Adversary Proceeding.

16. To the extent that the following Conclusions of Law are Findings of Fact, in whole or in part, they are adopted as Findings of Fact to that extent.

CONCLUSIONS OF LAW

1. To the extent the foregoing Findings of Fact are conclusions of law, in whole or part, they are adopted as Conclusions of Law.

2. This Court has jurisdiction over the subject matter of this Complaint to the extent of issues of dischargeability under 11 U.S.C. Section 523.

3. Paragraphs 10 and 11 of the Agreement, Plaintiff's Exhibit "1", provide for Plaintiffs to agree at some future date to act as general contractor for a reasonable contractor's fee in the construction of the premises situated on the real property. The parties thereafter entered into such an Agreement; specifically the Building Construction Contract, Defendants' Exhibit "A".

4. Paragraph 12 of said Agreement, Plaintiff's Exhibit "1", provides that Plaintiffs would act as a subcontractor to provide electrical services at 28890 Selfridge Drive, Malibu, California.

5. Plaintiff's Exhibit "1" was not entered into specifically for the purpose of providing working capital for the construction and development of the real property commonly known as 20600 Eagle Pass Drive, Malibu, California as contended by Plaintiff.

6. Neither John Taylor nor any other Plaintiff had or has an equitable interest in the subject real property by virtue of Plaintiff's Exhibit "1", or otherwise.

7. The encumbering of the subject real property and the use of proceeds therefrom by the Debtor for purposes other than the construction and improvement of the subject real property was not a misappropriation of money or property or the conversion of any property interest of Plaintiffs or any of them.

8. The use of proceeds from encumbering the real property by the Debtor was not a willful and malicious injury to the interests of Plaintiffs, or any of them, or to any property interests of Plaintiffs, or any of them.

9. The use of proceeds from encumbering the real property for purposes other than the construction and improvement of the subject real property was not a conversion or embezzlement or larcenous taking of any property interests of Plaintiffs, or any of them.

10. Defendants did not willfully or fraudulently convert or embezzle or larcenize the fair rental value of the property when Defendants used said property as their personal residence.

11. The claims of Plaintiff are dischargeable under 11 U.S.C. Section 523(a)(2)(A).

12. The claims of Plaintiffs are dischargeable under 11 U.S.C. Section 523(a)(4).

13. The claims of Plaintiffs are dischargeable under 11 U.S.C. Section 523(a)(6).

Dated: 12/12/83

RUSSELL B. SEYMOUR,
Bankruptcy Judge

I hereby attest and certify on 11/05/84 that the foregoing document is a full, true and correct copy of the original on file in my office, and in any legal custody.

By ,
Deputy
Clerk, U.S. Bankruptcy Court
Central District of California
[SEAL]

UNITED STATES BANKRUPTCY COURT
CENTRAL DISTRICT OF CALIFORNIA

JUDGMENT (F.R.C.P. 41(d))

CHAPTER 7, NO. LA 81-00606-RS
CONSOLIDATED ADVERSARY
NO. LA 81-0653-RS
NO. LA 81-5220-RS

DATE: NOVEMBER 2, 3 & 4, 1983
TIME: 9:30 O'CLOCK A.M.
COURT: "G", 9TH FLOOR

IN RE:

LAWRENCE J. GALARDI, dba
LAWRENCE J. GALARDI,
A Professional Corporation, and
SHARI J. GALARDI,
Debtors.

JOHN TAYLOR, An Individual,
JOHN TAYLOR, dba
LONDON ELECTRIC COMPANY,
A California Corporation,
Plaintiff,

VS.

LAWRENCE J. GALARDI, dba
LAWRENCE J. GALARDI,
A Professional Corporation, and
SHARI J. GALARDI,
Defendants.

FILED DECEMBER 2, 1983
CLERK, U.S. BANKRUPTCY COURT
CENTRAL DISTRICT OF CALIFORNIA
By ALG, Bankruptcy Clerk

ORDERED, Plaintiffs, and each of them, shall take nothing by their Complaint;

FURTHER ORDERED, judgment be and hereby is entered against Plaintiffs, and each of them, and in favor of Defendants, and each of them;

FURTHER ORDERED, claims of Plaintiffs are not excepted from discharge under 11 U.S.C. Sections 523(a)(2), (4), (6) or any sub-sections thereof.

Dated: December 12, 1983

RUSSELL B. SEYMOUR,
Bankruptcy Judge

I hereby attest and certify on November 5, 1984 that the foregoing document is a full, true and correct copy of the original on file in my office, and in my legal custody.

Clerk, U.S. Bankruptcy Court
Central District of California

By C. L. MACIAS, Deputy

[SEAL]

NOTICE OF ENTRY

To: The Plaintiff(s). Defendant(s), and Other Parties:

NOTICE IS HEREBY GIVEN that the foregoing Order/Judgment has been entered on the date stamped on the face of this pleading

CERTIFICATE OF MAILING

I hereby certify that a copy of this Order/Judgment was mailed to the attorney for the plaintiff(s); the attorney for the defendant(s); if not represented by an attorney, then to the defendant(s) and plaintiff(s) individually; and to either parties in interest as designated by this court on December 27, 1983.

DATED: December 27, 1983

JACK L. WAGNER, Clerk
U.S. Bankruptcy Court

By: Jane Stone
Deputy Clerk

APPENDIX E

DECLARATION OF BERNIE LERNER IN SUPPORT OF REQUEST FOR BOND PURSUANT TO SECTION 303(E) OF THE BANKRUPTCY CODE

UNITED STATES BANKRUPTCY COURT

CENTRAL DISTRICT OF CALIFORNIA
INVOLUNTARY CHAPTER 11
BANKRUPTCY NO. LA 82-20725RS

HEARING DATE: JUNE 14, 1983
HEARING TIME: 9:30 A.M.
COURTROOM NO: E

In re:

BERNIE LERNER, *Partner,*
LAWRENCE J. GALARDI, *dba*
LERNER AND GALARDI,
a General Partnership,
Alleged Debtors.
BERNIE LERNER,
Counter-Claimant,
vs.
RIAN ALDRICH, ELY SIMENTAL dba
C & S SEPTIC, JOHN LOGAN,
SAM GARCIA and STEPHEN KAMONT,
Counter-Defendants.

I, BERNIE LERNER, hereby declare under penalty of perjury as follows:

(1) I have been employed by Culver Carpet Company located at 4026 South Sepulveda Boulevard, Culver City, California, for the past twelve (12) years. Culver Carpet Company is the family business which was established in 1966. My father is in his early seventies and will leave this business to me upon his death. This business is valued at

approximately Two Million Dollars ($2,000,000.00) including the real estate it is situated upon.

(2) I own Eighty-Five Percent (85%) of stock in Culver Commercial Carpet, A California Corporation. My brother, Richard, owns the remainder of the stock. This company was founded five (5) years ago and is valued at approximately Five Hundred Thousand Dollars ($500,000.00). Last year, I received income from said company in the amount of Twenty-Six Thousand Dollars ($26,000.00).

(3) I own a condominium located at 3666 Via Dolce in Marina Del Rey. There is a mortgage on the property in the amount of One Hundred Sixty Thousand Dollars ($160,000.00). This property is valued at approximately Two Hundred Sixty Thousand Dollars ($260,000.00) I am current with my payments and this property has never been in default since I have owned it. I own a second mortgage secured by 376 Via Dolce which is a condominium. This second mortgage is in the amount of Seventy Thousand Dollars ($70,000.00). I receive the income from said mortgage on a monthly basis.

(4) I have a one-third (⅓) interest in real property located at 11158-11172 Washington Boulevard, Culver City, California. There is a first mortgage on said property in the amount of Two Hundred Thousand Dollars ($200,000.00) which is current and has never been in foreclosure or in default. Said real property is valued at approximately One and One-half Million Dollars.

(5) I own Forty-Two Percent (42%) of the real property located at 217 Linnie Canal, Venice, California. There is a first mortgage in the amount of Two Hundred Forty-Five Thousand Dollars ($245,000.00) which is now current and has never been in default or foreclosure. I am and have at all times been current with the mortgage

payments. This real property is valued at approximately Three Hundred Fifty Thousand Dollars ($350,000.00).

(6) I own one-half of the real property located at 220 South Venice Boulevard, Venice, California. There is a first mortgage in the amount of Two Hundred Thousand Dollars ($200,000.00) which has never been in default nor has said property been in foreclosure. I am and have at all times been current with the mortgage payments. This property is valued at approximately Three Hundred Thousand Dollars ($300,000.00).

(7) I have a money market account located at PaineWebber in Beverly Hills. My account number is TP4744326. As of the time of the hearing set for status conference in this matter, I have approximately Two Hundred Eighty-Two Thousand Dollars ($282,000.00) in cash in said account.

(8) I own a second mortgage on real property located at 317 Ocean Front Walk, Venice, California. Said second mortgage is in the amount of One Hundred Thousand Dollars ($100,000.00) and I receive income on a monthly basis from same.

(9) I have a checking account at Crocker Bank, located at the Sepulveda and National branch. My account number is 341-462-657. I have approximately Twenty Thousand Dollars ($20,000.00) in said account.

(10) I have one credit card which is a MasterCharge account. My account number is 5282-034184806605. My credit limit it Two Thousand Dollars ($2,000.00). I have never been late with any payments and have had said account since 1973. This account has always been paid to terms.

(11) On December 1, 1978 I entered into an Agreement with LAWRENCE J. GALARDI. Said Agreement

is attached hereto as Exhibit "A" and incorporated herein by this reference.

(12) My brother helped to negotiate this Agreement with LAWRENCE J. GALARDI. Although the Agreement does speak for itself, in particular attention should be directed to paragraph 2 of said Agreement. My only obligation pursuant to paragraph two (2) was to contribute the cash sum of One Hundred and One Thousand Dollars ($101,000.00). LAWRENCE J. GALARDI was responsible for the financing and improvement of the real property subject to said Agreement.

(13) Paragraph 4 speaks of "net profit". I was to receive a profit after certain costs were paid upon sale. In no event was I to be responsible for any expenses, interest on loans or debts of the enterprise pursuant to said Agreement. LAWRENCE J. GALARDI agreed to represent me as my attorney and in turn, I agreed to lend to LAWRENCE J. GALARDI the sum as hereinabove stated for the purpose of improvement and sale of the subject real property.

(14) I never met nor has any creditor of LAWRENCE J. GALARDI ever contacted me or made a demand for payment for any debt in connection with the subject real property. I have never at any time held myself out as LAWRENCE J. GALARDI'S partner. I did make an investment whereby the return of that investment was based upon profits. My brother, RICHARD LERNER represented me in a State Court proceeding against LAWRENCE J. GALARDI prior to his Petition in Bankruptcy. My brother further told me that his legal conclusion regarding this matter was that of a partnership arrangement. However, the document executed between myself and LAWRENCE J. GALARDI clearly speaks for itself, My present attorney, MARC ZEGAR, has explained to me the law with respect to partnerships as he

understands it and on the basis of his research and analysis, I am not LAWRENCE J. GALARDI'S partner. I have never held myself out as LAWRENCE J. GALARDI'S partner to any of his creditors and as I indicated before in this Declaration, took no part in the improvement of the real property subject to our Agreement.

Attached hereto as Exhibit "B" and incorporated herein by this reference is my 1982 tax return with gross income reported in the amount of One Hundred Fifty-Two Thousand, Seven Hundred Twenty-Seven Dollars ($152,727.00).

Attached hereto as Exhibit "C" and incorporated herein by this reference is my 1981 tax return with gross income reported in the amount of One Hundred Twenty-Two Thousand, Nine Hundred Fifty-Three Dollars ($122,953.00).

Thus far I have paid MARC ZEGAR, A PROFESSIONAL CORPORATION, Seven Thousand, Five Hundred Dollars ($7,500.00) as and for a retainer for legal fees in connection with this matter. Additionally, my accountant will charge me approximately One Thousand to One Thousand, Five Hundred Dollars ($1,000.00 to $1,500.00) as and for fees in connection with preparation of a financial statement certifying my Declaration in support of the bond requested. My attorney informs me that legal fees may be as much as Fifteen Thousand to Twenty Thousand Dollars ($15,000.00 to $20,000.00) depending upon how the facts develop and the manner in which the opposition prosecutes this action.

Executed on this 26th day of May, 1983.

BERNIE LERNER, Declarant

APPENDIX F

ORDER RE FINAL DECREE CLOSING THE ESTATE

UNITED STATES BANKRUPTCY COURT
CENTRAL DISTRICT OF CALIFORNIA

CASE NO.: LA- 82-20724 GM
(INVOLUNTARY)

In re:
JOHN PATRICK TAYLOR, Partner
LAWRENCE J. GALARDI, dba
LONDON CONSTRUCTION LIMITED, &
LONDON LIMITED,
TAYLOR AND GALARDI
A General Partnership

On October 5, 1983, an Order dismissing with prejudice the case of the debtor(s) named above was entered under Chapter 11, (11 U.S.C. § 1112(b), and due notice was provided. Since it appears that no further matters require that this case remain open or that the jurisdiction of this Court continue, IT IS ORDERED THAT:

1. All acts of the Debtor-in-Possession are approved;

2. The bond of the Debtor-in-Possession is exonerated; and

3. This case shall be deemed closed.

Entered October 23, 1984 Clerk, U.S. Bankruptcy Court Central District of Califonia by Deputy Clerk

DATED: October 23, 1984

GERALDINE MUND
Bankruptcy Judge

APPENDIX G

CASE NUMBER: LA 82-20725-GM
NOTICE OF DISMISSAL OF PROCEEDINGS UNDER CHAPTER 11

UNITED STATES BANKRUPTCY COURT
CENTRAL DISTRICT OF CALIFORNIA

IN RE:

BERNIE LERNER, partner;
LAWRENCE J. GALARDI, dba
LERNER & GALARDI, a general partnership
Debtor(s)

TO THE CREDITORS IN THE ABOVE-ENTITLED MATTER:

NOTICE IS HEREBY GIVEN that an Order was entered on October 7, 1983 dismissing the above entitled proceedings.

DATED: MAY 15, 1985

JACK L. WAGNER, Clerk
U.S. Bankruptcy Court

By: JEAN BESANCON
Deputy Clerk

FILED: MAY 15, 1985
CLERK U.S. BANKRUPTCY COURT,
CENTRAL DISTRICT OF CALIFORNIA
BY DEPUTY CLERK

CERTIFICATE OF SERVICE

I hereby certify that copies of the said notice were mailed to each of the following parties: To the debtor and to the debtor's attorney, to each of the creditors as stated in the schedules or who have duly filed proofs of claim, to the trustee and the trustee's attorney, and such other parties as appear of record in the file. A copy of said Notice was placed in the designated box and routed to the U.S. Trustee's Office.

DATED: May 15, 1985

MR. FRANK MARTINEZ
Deputy Clerk

APPENDIX H

IN THE SUPREME COURT OF THE
STATE OF CALIFORNIA

CASE NUMBER LA NO. 32184

LAWRENCE J. GARLARDI,
Petitioner,
VS.
THE STATE BAR OF CALIFORNIA,
Respondent.

BRIEF OF AMICUS CURIAE RAOUL D. MAGANA

RAOUL D. MAGANA
1801 Avenue of the Stars
Suite 810
Los Angeles, California 90067
(213) 553-6630
Amicus Curiae for
Petitioner Lawrence J. Galardi

FILED: NOVEMBER 31, 1986

[LETTERHEAD]

October 31, 1986

California Supreme Court
3580 Wilshire Boulevard
Room 213
Los Angeles, California 90010

Re: GALARDI v. STATE BAR
L.A. Number 32184

To The Honorable Chief Justice of The California Supreme Court:

I, Raoul D. Magana, respectfully request leave to file the attached amicus curiae brief and to present oral argument in support of Lawrence J. Galardi, petitioner in case L.A. No. 32184. Mr. Galardi has sought my assistance in this matter. I have known Mr. Galardi as a friend and advocate for many years. He once worked for me.

I have reviewed the transcripts of the Panel hearing, the decisions of the Panel and the Review Department, and the Parties' Supreme Court briefs. Being familiar with the issues and their presentation, I believe further argument is needed on the following points:

1. Exhibit 1 (the Taylor-Galardi agreement) evidences a loan transaction with respect to Eagle Pass, not a partnership or a joint venture; therefore, no fiduciary obligations arose between Mr. Galardi and Mr. Taylor.

2. The Supremacy Clause of the United States Constitution bars forceable reaffirmation and payment of any Taylor debt because all of Mr. Taylor's claims against Mr. Galardi, valid or not, were discharged in bankruptcy.

3. Whether Exhibit 4 (the Lerner-Galardi agreement) should be disregarded in its entirety, not just with respect to its recitals concerning receipt of $101,000 and existence of a lawyer-client relationship.

4. The evidence of record does not sustain the Bar's burden of proof on a number of key points, including proof of "overencumbrances", "refusal to account", and "willful and deliberate" conduct.

5. The discipline recommended by the Review Department is excessive and nonconstructive.

DATED: October 31, 1986

Respectfully submitted,
Raoul D. Magana

rdm/mb
cc: State Bar
Lawrence J. Galardi

(PROOF OF SERVICE BY MAIL — 1013(a) AND 2015.5 CCP)

STATE OF CALIFORNIA }
COUNTY OF LOS ANGELES } ss.

I, the undersigned, say: I am and was at all times herein mentioned a resident of the County of Los Angeles, over the age of eighteen years, and not a party to the within action or proceeding; that my business address is 1801 Avenue of the Stars, Suite 810, Los Angeles, California 90067; that on October 31, 1986, I served the within "Request For Leave to File Amicus Curiae Brief;" on the interested parties in said action or proceeding by depositing a true copy thereof, enclosed in a sealed envelope with the postage thereon fully prepaid, in the United States mail at Los Angeles, California, addressed as follows:

Supreme Court of the State of California (0 + 10)
3580 Wilshire Boulevard, Room 213
Los Angeles, California 90010

Lawrence J. Galardi, Esq.
904 Silver Spur, Suite 291
Rolling Hills, California 90274

Herbert M. Rosenthal
State Bar of California
555 Franklin Street
San Francisco, California 93002

If an * is placed before any name, it denotes personal delivery instead of mailing.

I certify (or declare) under penalty of perjury that the foregoing is true and correct.

Executed on October 31, 1986, at Los Angeles, California.

MATTIE E. BOUNDS

I am employed in the office of BRIAN R. MAGANA, a member of the bar of this court, at whose direction this service is made.

TABLE OF CONTENTS

	Page
Table of Authorities	H-6
PROLOGUE	H-7
THE LITIGATION	H-8
SELFREIGE	H-11
BIG ROCK	H-11
EAGLE PASS	H-13
BONSALL	H-18
CONCLUSION	H-27
Proof of Service	H-4

TABLE OF AUTHORITIES

	Page
U.S. CONST. Art. VI (1787)	H-17
U.S. CONST. Art. I § 8 cl. 4 (1787)	H-17
11 U.S.C. Section 524 (1984)	H-17
11 U.S.C. Section 524(a)(2)(1984)	H-17
11 U.S.C. Section 524(c) & (d)(1984)	H-17

PROLOGUE

Once upon a time Malibu real estate developers could do no wrong. Handsome houses were built. Astronomical interest rates were collected. Developers and bankers alike took unprecedented profits on highly leveraged deals. In this milieu Mr. Galardi became a successful, creditworthy developer of single family houses.

Success seduced developers into more ambitious projects. Mr. Galardi purchased a house to remodel on Selfridge Drive ("Selfridge"). Next he bought eight acres of land on Eagle Pass Drive ("Eagle Pass"). There he planned to build a house or two. Then he purchased 29 acres of land on Cool Oak Way adjacent to his Eagle Pass property ("Big Rock"). There he planned to build several houses.

More ambitious projects required more ambitious financing. Interest rates continued to climb and greater leveraging occurred. Mr. Taylor, for example, made loans equal to 60% or 70% of the property securing the loans. RT (9/15/83) 44-45. He did not find that ratio unreasonable. *Id.* He used the loan proceeds for construction, marketing and personal expenses. *Id.*

Unprecedented profits also attracted new profit participants. Individuals came to expect double-digit returns on monies loaned. Mr. Bernie Lerner ("Mr. Lerner") was not satisfied with the 10% return allowed by the usury laws. RT (9/15/83) 129. For this reason, he was not interested in making a straight loan to Mr. Galardi. *Id.*

The old caution that increased rates of return follow increased risks of loss became unimaginable, inconceivable. Losses? To quote Mr. Lerner: "We were in the middle of the biggest real estate boom the world has ever seen, so I don't think it came up. . . ." RT (9/16/83) 40;

Ex 4. As long as the cycle continued, everyone felt smart and successful and rich; and no one complained.

And then economic conditions changed. Mr. Taylor, contractor on Eagle Pass, did not pay Mr. Lerner promptly for $7,000 worth of carpet. RT (9/15/83) 122; RT (9/16/83) 51. Mr. Lerner testified that this caused him to question his transaction with Mr. Galardi as to Bonsall Drive in Malibu ("Bonsall"). He called his brother Richard Lerner ("Attorney Lerner") who had negotiated the Bonsall deal for him (RT (9/15/83) 113; (9/16/83) 19, 32-33) and who also represented Mr. Taylor. RT. (9/15/83) 128.

So began a series of law suits and bankruptcies which culminated in these State Bar proceedings against the now bankrupt Mr. Galardi. Neither Mr. Taylor nor Mr. Lerner were clients of Mr. Galardi. Both counts relate solely to Mr. Galardi's independent activities as an owner of property who was creditworthy and successful.

THE LITIGATION

On behalf of his family business Attorney Lerner filed suit against his client, Mr. Taylor, and Mr. Galardi to recover $7,000 for the carpet installed at Eagle Pass. EX B.

Attorney Lerner also filed two other State Court actions against Mr. Galardi—one based on a Taylor-Galardi three project agreement ("three project agreement") (Ex 1) and one based on a Lerner-Galardi Bonsall agreement ("Bonsall agreement") (Ex 4). RT (11/14/84) 112; (9/15/83) 42-43, 53. In the *Taylor* action, Attorney Lerner filed lis pendens on Eagle Pass, Bonsall and Big Rock. RT (9/15/83) 53. In the *Lerner* action, Attorney Lerner obtained writs of attachment on Bonsall, Eagle Pass and Big Rock and began to levy. RT (7/20/84) 104.

Based on the Bonsall agreement the *Lerner* action was ordered to arbitration and partially arbitrated. RT (11/14/84) 105- 106.

To prevent a trustee's sale of Eagle Pass Mr. Galardi filed Chapter 11 bankruptcy proceedings. RT (11/14/84) 60. Mr. Taylor forced Mr. Galardi into a Chapter 7 proceeding. RT (9/15/83) 49.

Mr. Galardi's unsecured creditors filed bankruptcy proceedings against a "Taylor-Galardi Partnership." RT (11/14/84) 63-64. The bankruptcy court dismissed the action based, in part, on Mr. Taylor's declaration that he was not Mr. Galardi's partner, only his lender. *Id.*

Mr. Taylor's claims against Mr. Galardi based on this three project agreement (Ex 1) were adjudicated in the bankruptcy court. Ex K & L. The bankruptcy court found that no partnership or joint venture existed and that no misconduct occurred because Mr. Galardi had the right to make loans on property he owned without accounting to Mr. Taylor. Ex K. On that basis the bankruptcy court discharged all of Mr. Taylor's claims against Mr. Galardi. Ex L.

Mr. Galardi's unsecured creditors also filed bankruptcy proceedings against a "Lerner-Galardi Partnership." RT (11/14/84) 64-65. The bankruptcy court dismissed the action based, in part, on Mr. Lerner's declaration that he was not Mr. Galardi's partner, only his lender. Ex I.

Mr. Lerner's claims against Mr. Galardi based on the Bonsall agreement (Ex 4) were later adjudicated in the bankruptcy court. In direct conflict with the dismissed "Lerner-Galardi Partnership" proceedings (Ex I), the bankruptcy court found that a joint venture existed and that misconduct occurred when Mr. Galardi encumbered Bonsall and used the loan proceeds for purposes not directly and immediately related to Bonsall without ac-

counting to Mr. Lerner or obtaining his consent. Findings of Fact and Conclusions of Law in U.S. Bankruptcy Court (C.D. Cal.) Bankruptcy No. LA 81-00606-BR, Adversary No. LA 81-5204-BR filed June 24, 1985 (*i.e.,* after the State Bar hearings ended Nov. 11, 1984). The bankruptcy court did not discharge Mr. Lerner's claims against Mr. Galardi. *Id.* Mr. Galardi has informed amicus that he filed a timely appeal and that federal appellate proceedings have not concluded.

Meanwhile, Mr. Taylor initiated State Bar proceedings with the help of Attorney Lerner. Contrary to the two prior bankruptcy proceedings, the State Bar Panel and the Bar Review Department construed the three project agreement (Ex 1) as a joint venture agreement. The Panel identified two loans and the Review Department identified three loans obtained without Mr. Taylor's knowledge or consent and used, in part, for purposes not directly and immediately related to Eagle Pass. The Bar did *not* find that Mr. Galardi refused to account to Mr. Taylor. The Panel recommended private reproval. Finding "factors in aggravation" the Review Department recommended a three-year suspension reduced to a one-year suspension plus a two-year probation *if* Mr. Galardi pays Mr. Taylor $85,000. As to Count Two the findings of the Bar are unsupported by the record and the recommendations of the Review Department are inappropriate, excessive and violative of the Supremacy Clause of the United States Constitution.

Concurrently, with the help of Attorney Lerner, Mr. Lerner also initiated State Bar proceedings. Contrary to the prior "Lerner-Galardi Partnership" bankruptcy proceedings, the State Bar Panel and the Bar Review Department construed the Bonsall agreement (Ex 4) as a joint venture agreement. The Panel identified one loan obtained without Mr. Lerner's knowledge or consent and

two loans used, in part, for purposes not directly and immediately related to Bonsall. The Review Department identified *no* loans obtained without Mr. Lerner's knowledge. The Review Department did, however, find four loans obtained without his consent. Contrary to the Lerner bankruptcy proceedings, the Review Department found that Mr. Galardi refused and refuses to account to Mr. Lerner. The Panel recommended private reproval. Finding "factors in aggravation" the Review Department recommended a three-year suspension reduced to a one-year suspension plus a two-year probation *if* Mr. Galardi pays Mr. Lerner $101,000. As to Count One the Bar's recommendations are inconsistent; its findings are unsupported by the record.

Amicus, thus, urges that this Court find in favor of Mr. Galardi on Count Two. Amicus also urges that this court adopt the recommendations of the Panel as to Count One. Amicus alternatively urges that this Court defer ruling on Count One until Mr. Galardi has exhausted his federal bankruptcy appeal and, should he lose that appeal, order more constructive discipline.

SELFRIDGE

Mr. Taylor gave Mr. Galardi $85,000 and entered into a three project agreement with Mr. Galardi. Ex 1. On the first project, Selfridge, Mr. Taylor agreed to be the electrical subcontractor. *Id.* Mr. Taylor apparently performed his contract and received his pay. Mr. Galardi sold Selfridge at a profit in January of 1979. RT (11/14/84) 33; (8/27/84) 34.

BIG ROCK

Mr. Taylor gave Mr. Galardi $85,000 and entered into a three project agreement with Mr. Galardi. Ex 1. On the

last project, Big Rock, Mr. Taylor agreed to build the first of several houses. *Id.* He never did. RT (11/14/84) 67; (7/8/83) 54.

Mr. Galardi and his wife owned Big Rock. RT (7/8/83) 66-67. Mr. Galardi informed Amicus that he used Big Rock in conjunction with Eagle Pass (an adjacent property which he owned) to secure a series of loans used to develop Eagle Pass and, to a lesser extent, Big Rock. RT (9/15/83) 63-66, 70. See the section on Eagle Pass below.

In the spring of 1980 Mr. Galardi arranged for Newport Pacific Funding Inc. to obtain about $3,000,000 secured by Big Rock, Eagle Pass and Bonsall for the purpose of paying off existing loans and providing construction funds for completing the Eagle Pass house and building houses at Bonsall and Big Rock. RT (11/14/84) 25-26, 30. In June of 1980 he received the first $250,000. RT (11/14/84) 26. That money paid off existing loans on Bonsall and Eagle Pass. RT (8/27/84) 24-25.

In August of 1980 he expected to receive the next $800,000. RT (11/14/84) 59. Because of lis pendens and writs of attachment obtained in the State Court actions by Mr. Taylor and Mr. Lerner and levied on the three properties, the loans procured for Mr. Galardi by Newport Pacific Funding, Inc., were never funded. *Id.*; (11/14/84) 31. Further attempts to borrow funds also failed. RT (11/14/84) 59. Mr. Galardi has informed Amicus that after Mr. Taylor forced him into a liquidation bankruptcy (RT (9/15/83) 49) he lost Big Rock by foreclosure. RT (9/15/83) 71. As a matter of fact Great Western foreclosed on Bonsall and Tokai Bank obtained title to the 29 acres in a sale authorized by the Bankruptcy Court (as Mr. Galardi has informed Amicus).

EAGLE PASS

Mr. Taylor gave Mr. Galardi $85,000 and entered into a three project with Mr. Galardi. Ex 1. On the second project, Eagle Pass, Mr. Taylor agreed to be the general contractor for the construction of the house. Ex 1. He never completed the work. RT (9/15/83) 38, 40.

Mr Taylor agreed to receive contractor's fees. Ex 1. He received partial payment RT (7/8/83) 37; RT (9/15/83) 90.

Mr. Taylor agreed to be electrical subcontractor. Ex 1. He never completed that work. RT (9/15/83) 38, 40.

Mr. Taylor agreed to receive a percentage of the profits, if any, from the sale of Eagle Pass. Ex 1. Because Mr. Taylor never completed the construction no profits exist under the terms of the agreement. Ex K.

Mr. Galardi considered the $85,000 as a loan from Mr. Taylor not earmarked for use at Eagle Pass. Petition for Writ of Review, Appendix F, Paragraph g. In two separate proceedings the bankruptcy court agreed. Ex. K; "Taylor-Galardi Partnership" proceedings. Amicus urges that Exhibit 1 sets forth only a loan transaction. If so, as the bankruptcy court concluded, no misconduct occurred because Mr. Galardi had no obligation to obtain Mr. Taylor's consent before encumbering Mr. Galardi's own property for his own purposes. Ex K, L.

When Mr. Taylor gave Mr. Galardi $85,000 in October of 1977, Mr. Galardi owned the eight acres at Eagle Pass and had completed site preparation. RT (7/8/83) 56; (8/27/84) 11. He had a $100,000 mortgage as a result of refinancing with a private lender, Mr. Russell. Appendix A. The two paragraphs of the Taylor-Galardi agreement related to the $85,000 (paragraphs 6 & 16) are *not* specifically linked to the paragraphs related to Eagle Pass and are *not* specifically isolated from the paragraphs

related to Selfridge (paragraph 12) and Big Rock (paragraphs 11 & 13). Mr. Taylor knew that the $85,000 he loaned Mr. Galardi replaced Mr. and Mrs. Galardi's funds earlier used for prior site preparation at Eagle Pass. RT (7/8/83) 33.

The three project agreement refers to a $240,000 construction loan. Ex 1. Based on Mr. Taylor's costs of construction as of February 8, 1978, however, Mr. Taylor's construction contract with Mr. Galardi requires $284,805.00. Ex 2. Mr. Taylor knew that completion of the Eagle Pass project required considerably more than $300,000, especially since the plans priced did not include any of the interior details, finish work, pool, landscaping, stables or gatehouse described in the contract. RT (7/8/83) 15-17; Ex. 1 & 2. He also knew that Tokai Bank would not lend more than $300,000 at that time. RT (7/8/83) 17. Mr. Taylor testified that he "consented" to three loans on Eagle Pass totalling $650,000. RT (9/15/83) 16, 23-24. Thus, any inferences that Mr. Taylor and Mr. Galardi agreed to limit loans on Eagle Pass to $240,000 or to limit use of loan proceeds to Eagle Pass are unsupported by the evidence.

Mr. Taylor denied knowledge of and consent to two additional Tokai Bank loans on Eagle Pass totalling $150,000. RT (7/8/83) 69. Mr. Galardi testified that he told Mr. Taylor about these loans and that Mr. Taylor approved. *See,* Appendix A. Mr. Galardi's version is supported by Mr. Taylor's testimony that the Tokai Bank funds were disbursed via a voucher system and that he had physical possession of the vouchers delivered to the subcontractors. RT (7/8/83) 64-65; Ex 2.

Further, the Bar's accounting of the $120,000 Tokai Bank loan is unfair to Mr. Galardi. Use of that loan to pay off a prior loan on Big Rock did benefit Mr. Taylor. Mr. Taylor had a direct involvement in Big Rock because he

was to construct the first house there. Ex 1. Mr. Taylor also gained an indirect benefit from Big Rock to the extent that its development enhanced the value of his profit participation in the adjacent Eagle Pass property.

Mr. Taylor also denied knowledge of and consent to a $500,000 loan on Eagle Pass.[1] RT (9/15/83) 24. Mr. Galardi contends that he did not tell Mr. Taylor about this loan. *See* Appendix A. Mr. Taylor himself testified that he learned about the loan from his friend at Tokai Bank, Tommy Nakachi, in February of 1980 when Mr. Galardi obtained the loan. RT (7/8/83) 37. The record does not support the finding that Mr. Taylor had no knowledge of this loan.

The three project agreement did not require Mr. Taylor's consent, written or oral, to encumbrances on Eagle Pass. Ex 1. Mr. Taylor testified that he saw Mr. Galardi in February of 1980, the day after he learned of the $500,000 loan and that, at that time, he did not tell Mr. Galardi that he disapproved or requested any accounting. RT (9/15/83) 98; (7/8/83) 38. testimony supports Mr. Galardi's perception that Mr. Taylor consented. *See,* Appendix A.

Mr. Taylor first requested an accounting in a letter dated July 8, 1980 (Ex 3), right after Mr. Lerner placed a mechanic's lien on Eagle Pass based on Mr. Taylor's failure to pay Mr. Lerner $7,000 for carpet installed at Eagle Pass. RT (9/15/83) 122. Mr. Taylor's construction contract with Mr. Galardi required Mr. Taylor to indem-

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[1]Although Mr. Galardi's escrow instructions specifically required two trust deeds (one on Eagle Pass for $400,000 and one on Bonsall for $100,000), without Mr. Galardi's knowledge, the lender unilaterally procured a $500,000 trust deed secured by both properties with provision to release Eagle Pass for $400,000 and Bonsall for $100,000. RT (9/15/83) 93-94; (8/27/84) 15.

nify Mr. Galardi for any lien liability. Ex 2 (Paragraph 5). Mr. Taylor's testimony that he did not consent to this loan is no more credible and no less self-serving than Mr. Galardi's testimony that Mr. Taylor did consent, regardless of his need to do so. The record does not show that the Bar sustained its burden of proof on the issue of consent.

The record also does not support the Bar's conclusion that Mr. Galardi willfully and deliberately breached any fiduciary obligations to Mr. Taylor. His treatment of the $85,000 as an unsecured loan from Mr. Taylor is clearly reasonable. The United States Bankruptcy Court so found in two separate proceedings. Ex K & L; "Taylor-Galardi Partnership" proceedings. Even if this Court finds that a joint venture existed on Count Two, discipline stronger than a private reproval is not appropriate.

Similarly, the "overencumbrance" on which the Review Department bases its recommendation for enhanced punishment is not supported by the record. In February of 1980 Eagle Pass secured loans totalling $1,210,000. RT (9/15/83) 97-98. Of that amount, $800,000 was also secured by other properties. Ex K. Mr. Lerner testified that in early 1978 Mr. Taylor had a buyer interested in paying $900,000. RT (11/14/84) 90-91. In October of 1980 Mr. Galardi opened an escrow to sell Eagle Pass for $3,400,000. RT (11/14/84) 70. Mr. Taylor himself testified that he knew of two oral offers on Eagle Pass. RT (9/15/83) 99. The fact that Mr. Galardi lost Eagle Pass by foreclosure at some future date, and after the forced bankruptcy, generating no profits for Mr. Taylor, (RT (8/27/83) 18-19) does not automatically prove that Mr. Galardi overencumbered Eagle Pass in February of 1980, particularly in light of the contrary evidence on the record.

Finally, the particular discipline chosen by the Review Department is barred by the Supremacy Clause of the United States Constitution. U.S. Const. Art. VI (1787). As a condition of substituting two years of probation for two years of suspension the Review Department requires Mr. Galardi to pay Mr. Taylor $85,000. Any debt owed Mr. Taylor by Mr. Galardi based on the three project agreement (Ex 1) was discharged in bankruptcy. Ex K & L. This Court has no jurisdiction to forcibly reinstate any such debt. U.S. CONST. Art. VI (1787) (Supremacy Clause); U.S. CONST. Art I § 8 cl. 4 (1787) (Bankruptcy Powers); 11 U.S.C. Section 524 (1984). The State Bar is subject to 11 U.S.C. Section 524(a)(2)(1984) which provides, in part: "(a) A discharge under this title-(2) operates as an injunction against . . . an act, to collect, recover or offset any such debt as a personal liability of the debtor, whether or not discharge of such debt is waived." Under 11 U.S.C. Section 524(c) & (d)(1984) reaffirmation of discharged debts is strictly limited to agreements made prior to discharge and approved by the United States Bankrupcty Court. Because the Bankruptcy Code is specifically designed to give the debtor a "fresh start," 11 U.S.C. Section 524 (1984) provides, in part:

> "(A) governmental unit may not deny, revoke, suspend, or refuse to renew a license . . . or other similar grant to, condition such a grant to, discriminate with respect to such a grant against, deny employment to, terminate the employment of, or discriminate with respect to employment against, a person that is or has been a debtor under this title . . . solely because such . . . debtor is or has been a debtor under this title . . . *or has not paid a debt that is dischargeable in the case under this title* . . ." (emphasis added.)

BONALL

In the summer of 1978 Mr. and Mrs. Galardi opened an escrow to purchase Bonsall for $285,000. RT (9/15/83) 127, 112; (11/14/84) 48-49. They arranged for a $200,000 loan from Great Western. RT (11/14/84) 13-14. They needed about $100,000 more to close the deal. RT (9/15/83) 112. At about the same time Mr. Lerner told Attorney Lerner that he had about $100,000 to invest. RT (9/15/83) 128.

Mr. Galardi asked Mr. Taylor if he wanted to provide the money but Mr. Taylor told Mr. Galardi that Mr. Taylor had none. RT (9/15/83) 36. Mr. Taylor introduced Mr. Galardi to his attorney, Attorney Lerner. RT (9/15/83) 35, 42, 53, 128. Attorney Lerner approached Mr. Lerner. RT (9/15/83) 128. Mr. Lerner knew Mr. Galardi from Mr. Taylor to whom he had sold carpet regularly. RT (9/15/83) 36, (9/16/83) 93.

Mr. Galardi wanted a loan. RT (9/15/83) 100. Mr. Lerner did not want a simple loan because he felt that the 10% return allowed by the usuary laws was inadequate. RT (9/15/83) 129. Attorney Lerner negotiated a deal with Mr. Galardi on behalf of himself and Mr. Lerner. RT (9/15/83) 113: (9/16/83) 19, 68: Ex 4 (Paragraph 5); Ex G, Q.

Attorney Lerner exacted an exclusive real estate listing as part of the Bonsall agreement. Ex 4 (Paragraph 5). He also received $10,000 in conjunction with the deal. Ex G, Q. The Bonsall agreement does *not* provide for any such payment. Ex 4. Mrs. Galardi testified that at the State Court Arbitration Hearing the following exchange occurred (RT (11/14/84) 32):

> Bernie Lerner: "You never told me that you got $10,000 for this deal."
>
> Richard Lerner: "Shut up, stupid."

Mr. Lerner gave contrary testimony to the Bar Panel. *See, e.g.,* RT (9/15/83) 114.

The Bonsall agreement recites receipt of $101,000 by Mr. Galardi from Mr. Lerner. Ex 4 (Paragraph 2). In fact, Mr. Lerner only gave Mr. Galardi $91,000 on December 1 1978. Ex 7A. He did not pay Mr. Galardi the additional $10,000 until several months later. Ex 6, Q. Mr. Lerner and Attorney Lerner testified that the $10,000 paid to Attorney Lerner was not part of that $101,000. *See, e.g.,* RT (7/20/84) 53. (9/16/83)67-68. Mr. Lerner also testified (RT 9/16/83) 55):

> Mr. Galardi "Q: That $101,000 included the $10,000 that I [Galardi] paid to Richard as points or finder's fee?
>
> Mr. Lerner A: Right.
>
> Mr. Galardi Q: Did that understanding ever change?
>
> Mr. Lerner A: I don't think it could."

The Bonsall agreement recites a lawyer-client relationship between Mr. Galardi and Mr. Lerner. Ex 4 (Paragraph 1). The Panel found none. The Review Department found none. The United States Bankruptcy Court found none in two separate proceedings. Mr. Lerner did not want to be Mr. Galardi's client. RT (9/15/83) 131, 133. Attorney Lerner was/is Mr. Lerner's attorney. RT (9/16/83) 22, 32-33; (7/20/84) 86, 93. Attorney Lerner testified (RT 9/16/83) 103-104:

> "And I said 'If you [Galardi] are willing to undertake to represent my brother in writing as my brother's attorney, then I would feel — I would have a basis to represent to my brother to put the property in your name.
>
> * * *

> . . . and I said, 'Do you understand what this is? You are asking my brother to give you $100,000, and the only way he can think about doing it, Mr. Galardi, is if you agree to represent him as an attorney, because, as an attorney, I have taken money from clients in trust, and I understand my responsibility.
>
> * * *
>
> I told Mr. Galardi then, and I told him subsequently in the presence of his wife at a later meeting that 'your bar license is literally on the line with this'."

Query why this acrimonious relationship continued, but it did.

Both attorneys signed the Bonsall agreement. Ex 4. Attorney Lerner gave Mr. Lerner's $91,000 check payable to Mr. Galardi's trust account to Mr. Galardi and accompanied him to the bank where he deposited and immediately withdrew that amount. RT (7/20/84) 8, 14. Mr. Galardi used some of the money to close escrow on Bonsall. *See*, Appendix B.

Mr. Galardi obtained a series of loans secured by Bonsall. *See*, Appendix B. The Panel found only one loan ($500,000) to have been made without Mr. Lerner's knowledge. ***The Review Department did not find any loans made without Mr. Lerner's knowledge.*** All of the witnesses testified that Mr. Galardi told Mr. Lerner about the loans. RT (9/15/83) 116, 121; (9/16/83) 43-44, 72, 74; (11/14/84) 110, 111; (7/20/84) 18, 21, 23, 45-46; (11/14/84) 23, 26, 27; (8/27/84) 26, 55, 57, 87.

The Panel found only one loan ($500,000) to have been made without Mr. Lerner's consent. The Review Department found four such loans. The Bonsall agreement did not require written consent by Mr. Lerner. Ex 4. Mr. Galardi negotiated the $60,000 *months before* he entered

into the Bonsall agreement. RT (11/14/84) 55. Mr. Lerner knew about the $60,000 loan and did not object. RT (9/16/83) 43-44. Mr. Lerner knew about the $50,000 loan. RT (9/16/83) 43-44. He did not object. *Id.* Mr. Galardi believed that he consented. RT (11/14/84) 56 (8/27/84) 25. In December of 1979 or January 1980, Mr. Lerner obtained the exact loan figures from Mr. Galardi and took a full tax write-off for those loans on his personal tax return. RT (9/15/83) 121; RT (9/16/83) 6. What interpretation can there be other than that this constituted consent in its most obvious form to all prior loans?

Mrs. Galardi testified that Mr. Lerner consented to the $500,000 loan and the $250,000 loan. Rt (11/14/84) 23, 26, 27. She testified (RT (11/14/84) 23): "Bernie said, 'Larry, you are good at this. Do your own thing." Mr. Galardi believed that he consented. RT (8/27/84) 26; (11/14/84) 56, 78, 80, 100, 103; Ex P.

On June 6, 1980 Mr. Galardi negotiated the $250,000 loan. RT (11/14/84) 103.[2] On June 19, 1980 he met with Mr. Lerner who thought he promised that he would not further encumber Bonsall without Mr. Lerner's consent. RT (7/20,84) 42; (9/15/83) 26. Apparently, the $250,000 loan was funded on June 25, 1980. Mr. Galardi thought that Mr. Lerner consented to the $250,000 loan and that he did not refuse to consent to further encumbrances until July of 1980. RT (8/27/84) 26; (11/14/84) 76, 76-78, 100. Given the timing of the $250,000 loan, it was not a "further encumbrance" even under Mr. Lerner's view of the facts. To the extent that it reduced the total amount secured by Bonsall, releasing Bonsall from the $500,000 loan, Mr. Lerner would be "unreasonable" in withholding

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[2]Mr. Galardi informed Amicus of the exact date, using a document not in evidence.

his consent, hence, in violation of the Bonsall agreement. Ex 4 (Paragraph 2).

No problem exists as to the $200,000 purchase money first trust deed. Mr. Lerner knew he gave Mr. Galardi $91,000 and Bonsall cost $285,000. RT (9/15/83) 112; Ex 7-A. The Bonsall agreement recognizes the existence of a first trust deed separate from construction loans. Ex 4. (Paragraph 4(b)).

The record contains no stipulation as to the total encumbrances on Bonsall as of July of 1980. Apparently, the only other loan then existing was the $250,000 loan. Admittedly, Mr. Galardi used part of that loan to pay off a mortgage on Eagle Pass so that he could borrow more money for use at Bonsall. RT (11/14/84) 57-58. The remaining $100,000 released Bonsall from the $500,000 loan which paid off the $60,000 loan and the $50,000 loan. Thus, the $250,000 cured any "misconduct" associated with the use of proceeds from the prior loans, contrary to the Panel's findings as to the $500,000 loan and the Review Department's findings as to all three prior loans.

The Bonsall agreement gave Mr. Galardi permission to encumber Bonsall by $100,000 for purposes of construction. Ex 4 (Paragraph 2(b)). Over $16,000 paid for the Bonsall pool. RT (8/27/84) 20. Mr. Galardi accounted to Mr. Lerner for at least another $68,000. RT (9/15/83) 124. As noted above, Mr. Galardi accounted for Mr. Lerner's $101,000. *See,* Appendix B. That leaves about $12,000 unspecified. The Review Department's finding that Mr. Galardi "refused and still refuses to account" unfairly characterizes the record. He accounted as best he could.

The record also fails to support the Review Department's conclusion that Mr. Galardi had overencumbered Bonsall as of June of 1980. The record contains no

evidence as to the value of Bonsall as of that time. The improvements at Bonsall then included a Gunite pool with fence, corrals, an enclosed patio at the guest house, a brick wall along the sizeable frontage of the property, a foundation and partial lighting for the tennis court and new landscaping. RT (7/20/84) 43-44; Ex 9. Not in evidence is the United States Bankruptcy Court finding that Bonsall had a fair market value of $600,000.00 in January of 1980. In June of 1980 Mr. Galardi had loans totalling $450,000 secured by Bonsall. Mr. Taylor testified that he encumbered properties up to 70% of their value and did not consider that practice unreasonable. RT (9/15/83) 44-45. The only contrary evidence is that at some unspecified future time after the Lerner suits and the bankruptcy filing, Bonsall was lost in foreclosure and Mr. Lerner lost his $91,000. RT (9/15/83) 127.

Whether Mr. Galardi had to earmark any loan proceeds for Bonsall and to account to Mr. Lerner for the use of the funds depends on whether a partnership/joint venture existed. The Panel found that the Bonsall agreement (Ex 4) created a joint venture. The Review Department adopted its findings. The Bar did not find that any other basis existed for creating any fiduciary obligation. The Bar's finding that the Bonsall agreement created a joint venture is inconsistent with its finding that it did not create a lawyer-client relationship. Attorney Lerner, representing Mr. Lerner, drafted both the "lawyer-client" and the "joint venture" language. Ex F-1. Mr. Lerner filed a declaration with the United States Bankruptcy Court stating: "I agreed to lend LAWRENCE J. GALARDI the sum [$101,000]." Ex I. He further declared: "I have never at any time held myself out as LAWRENCE J. GALARDI'S partner." *Id.*

The plain meaning of the Bonsall agreement (Ex 4) did not memoralize the agreement between Mr. Lerner and

Mr. Galardi, despite its merger clause. The Bar rejected the "lawyer-client" recitals. The Bar rejected the $101,000 receipt recital, finding that Mr. Lerner gave Mr. Galardi only $91,000 on December 1, 1978. Why should the recitals as to the "joint venture" or the encumbrance limitations be taken at face value? In essence, isn't the real issue here the Lerner's demand for an equity interest in Mr. and Mrs. Galardi's properties?

At the outset Mr. Galardi told Mr. Lerner that he obtained loans where he could and used the proceeds to serve his needs, including his living expenses. RT (9/15/83) 117; (9/16/83) 44. He took no other salary for his services as purchasing agent, project supervisor and money manager. Mr. Taylor operated the same way. He borrowed money where he could and used it for construction and personal expenses. RT (9/15/83) 44-45.

Mr. Lerner was quite willing to accept the benefits of such loans secured by properties other than Bonsall. RT (9/16/83) 86-87. He took the tax benefits of at least two of the loans he later questioned. RT (9/15/83) 212; (9/16/83) 6. Until June or July of 1980 he gave Mr. Galardi no reason to believe that he objected to Mr. Galardi's standard operating procedure. For example, Mr. Galardi met with him sometime between January of 1979 and February 1980 (depending on whose testimony is believed) and presented plans for building a manor house at Bonsall in addition to the project outlined in the Bonsall agreement. RT (11/14/84) 21-22; (9/15/83) 118; (7/20/84) 38-39; Ex 4. Attorney Lerner testified that Mr. Galardi told Mr. Lerner (RT (7/20/83) 40): "It's more money . . . and with your permission, I'd like to do it." Mr. Lerner voiced no objection to Mr. Galardi. RT (9/15/83) 119. Mr. Lerner only discussed his concerns with Attorney Lerner. RT (9/16/83) 48. Attorney Lerner told Mr. Lerner that a bigger project would mean bigger profits

for Mr. Lerner. RT (9/15/83) 119. As long as Mr. Lerner saw visions of sugar plums he did not complain. Mr. Galardi, not unreasonably, interpreted Mr. Lerner's response as a consent to obtain the necessary additional financing.

The Bonsall agreement made no provision for losses. Ex 4. Mr. Galardi *obtained all of the financing based on his own creditworthiness.* RT (9/16/83) 14, 18. He never asked Mr. Lerner to establish his creditworthiness or to provide additional security. RT (9/16/83) 14, 18. Mr. Galardi viewed all of the loans as his sole responsibility. RT (11/14/84) 16, 23-24. To the bitter end he tried to obtain enough financing to complete the project successfully. RT (11/24/84) 59, (8/27/84) 54-55. Once Attorney Lerner filed the lis pendens and levied on the writs of attachment in August of 1980, however, Mr. Galardi could not obtain further financing, regardless of the value of the Bonsall property. RT (11/14/84) 59-60.

The Bar's finding that Mr. Galardi's actions were "willful and deliberate" conflicts with the Review Department's finding that he "denies any wrongdoing and fails to appreciate the fiduciary obligation that he had." Mr. Galardi truly believed that Mr. Lerner knew about all of the loans. The Review Department made no finding to the contrary. Mr. Galardi truly believed that until July of 1980 Mr. Lerner consented to his loan practices. Mr. Galardi truly believed that he always put forth his best efforts to protect Mr. Lerner's interests.

Admittedly, Mr. Galardi failed to appreciate any fiduciary obligation created by the Bonsall agreement. Requiring Mr. Galardi to pay Mr. Lerner $101,000 which Mr. Galardi does not have, will do absolutely nothing to educate Mr. Galardi. For that purpose, ordering Mr. Galardi to take appropriate legal ethics or real estate courses could be much more effective. Ordering Mr.

Galardi to research and write a law review article or CEB book on legal ethics for real estate developers would be another constructive alternative. Perhaps, under supervision, Mr. Galardi could prepare and give a course on the ethics of joint ventures to real estate brokers and turn over his lecture fees to Mr. Lerner. Amicus urges this Court to impose more creative and effective disciplinary measures.

Amicus further urges this Court to wait until Mr. Galardi has exhausted his federal appellate remedies before imposing discipline. For the reasons set forth as to Eagle Pass, the Supremacy Clause may bar forcible reinstatement of any debt.

CONCLUSION

Amicus has known Mr. Galardi for almost seventeen years. As indicated on the professional profile appended to his brief, Mr. Galardi has given much to the legal profession. He has taught. He has lectured. He has given his time and energy to professional societies. He has written articles to help other lawyers. This disciplinary proceeding is his first in over twenty-five years of practice. Neither of the charges relates to his professional activities. The real estate activities at issue have not made him a wealthy man. He has become a debtor in federal bankruptcy proceedings. Given the Panel's findings of fact, aren't the Review Department's recommendations both excessive and unfounded? What could possibly be accomplished by subjecting Mr. Galardi's wife and children to greater financial hardship than they have already suffered? Surely, if discipline is warranted, the State Bar has more constructive means of enforcing its will than depriving Mr. Galardi of his means of supporting his family. Amicus strongly urges this Court to choose another path.

DATED: October 31, 1986

Respectively submitted,

RAOUL D. MAGANA
Amicus for Petitioner,
Lawrence J. Galardi

APPENDIX I

DATE	USE OF LOAN PROCEEDS	$ PRINCIPAL AMOUNT	LENDER	SECURITY IN ADDITION TO EAGLE PASS	PROOF OF TAYLOR "KNOWLEDGE"	PROOF OF TAYLOR "CONSENT"
1/1/77	Refinancing purchase of Eagle Pass	100,000	Mr. Russell	—	N/A	N/A
RT(8/27/84)11	RT(8/27/84)11	RT(8/27/84)11	RT(8/27/84)11	—	—	—
10/1/77	Prior Site Preparation at Eagle Pass	85,000	Mr. Taylor	Unsecured	Taylor	Taylor
Ex 1	RT(7/8/83)33	Ex 1	Ex 1	Ex 1	Ex 1	Ex 1
6/12/78	Eagle Pass Fees, Construction, Interest	300,000	Tokai Bank	[Big Rock]* RT(9/15/83)63-66	Taylor	Taylor
RT(9/15/83)67	RT(9/15/83)69	RT(9/15/83)67	RT(9/15/83)67	RT(9/15/83)70	RT(9/15/83)23-24	RT(9/15/83)23-24
6/12/78	Pay of Big Rock loan	120,000**	Tokai Bank	[Big Rock]*	Galardi	—
RT(9/15/83)67	RT(8/27/84)13 [Eagle Pass] RT(9/15/83)63	RT(9/15/83)67	RT(9/15/83)67	as above	RT(11/14/84)69	—
7/24/79	Eagle Pass Fees, Construction, Interest	100,000	Tokai Bank	[Big Rock]*	Taylor	Taylor
RT(9/15/83)67	RT(9/15/83)69	RT(9/15/83)67	RT(9/15/83)67	as above	RT(9/15/83)23-24	RT(9/15/83)23-24
7/24/79	†	30,000** ***	Tokai Bank	[Big Rock]*	Galardi	—
RT(9/15/83)67	—	RT(9/15/83)67	RT(9/15/83)67	as above	RT(11/14/84)69	—
11/29/79	Eagle Pass Fees, Construction, Interest	250,000	Tokai Bank	[Big Rock]*	Taylor	Taylor
RT(9/15/83)67	RT(9/15/83)69	RT(9/15/83)67	RT(9/15/83)67	as above	RT(9/15/83)23-24	RT(9/15/83)23-24
2/1/80	Loans & Living Expenses	500,000**	Simon-Ehrenfeld Group	Bonsall & Big Rock & EP	Galardi	Galardi
RT(9/15/83)93-94	RT(8/27/84)16 $10,000 on Bonsall RT(8/27/84)24	RT(9/15/83)93-94	RT(9/15/83)93-94	RT(9/15/83)93-94	RT(8/27/83)18	RT(8/27/84)18
2/1/80	Eagle Pass Cost of Construction (7/80) totals at least $732,139.00 Ex K	Total Principal and Interest $1,210,000 RT(9/15/83)97-98				

Key:
* Galardi representations as counsel based on Tokai Bank documents
** Loans at issue per Review Department.
*** Loans *not* at issue per Panel.

APPENDIX II

DATE	USE OF LOAN PROCEEDS	$ PRINCIPAL AMOUNT	LENDER	SECURITY IN ADDITION TO BONSALL	PROOF OF LERNER "CONSENT"
Before 12/1/78 RT(11/14/84)13-14	Purchase Bonsall RT(8/27/84)19	200,000 RT(8/27/84)19	Great Western RT(8/27/84)19	— —	Lerner RT(9/15/83)112; Ex 4
12/1/78 Ex 7-A	RT(7/20/84)113, 118-119 Purchase $76,775 Escrow fees 5,233 Brokerage 13,680 Bonsall Escrow $95,688	91,000 Ex 7-A	Mr. Lerner Ex I	— —	Lerner Ex I RT(9/16/83)55; Ex 4
7/1/78 Negotiated RT(11/14/84)55	Bonsall pool $16,000 and remainder to clear existing costs of construction, e.g., tennis court; living expenses	60,000* RT(8/27/84)19	U.S. Life RT(8/27/84)19	— —	Mrs. Galardi RT(11/14/84)23 Galardi RT(11/14/84)76-78
3/1/79 funded RT(7/20/84)21	RT(8/17/84)19-21				
3/20/79 Ex 6	*Fee to Attorney Lerner* Ex G, Ex Q; RT(9/16/83)55	10,000 Ex 6	Mr. Lerner Ex 6	— —	Lerner Ex I RT(9/16/83)55
5/1/79 RT(9/15/83)117	At least $68,000 for Bonsall construction RT(9/15/83)124; Ex 4	100,000 RT(9/15/83)117 Ex 4	† 	† 	Lerner RT(9/16/83)84; Ex 4
10/31/79	Galardi "old bills" RT(8/27/84)22	50,000* RT(8/27/84)21	Business Loans, Inc. RT(8/27/84)21	— —	Mrs. Galardi RT(11/14/84)23 Galardi RT(11/14/84)56,76-78
2/1/80 RT(9/15/83)97-98	Pay off prior loans ($50,000 & $60,000) RT(8/27/84)23 $10,000 Bonsall RT(8/27/84)24 Living expenses RT(8/27/84)16	500,000* ** RT(9/15/83)93-94	Simon-Ehrenfeld Group RT(9/15/83)93-94	Eagle Pass RT(9/15/83)93-94	(Knowledge & consent) Mrs. Galardi RT(9/11/14/84)23 Galardi RT(11/14/84)56,76-78, 80,103; Ex P
[6-6-80] negotiated [not in record] 6/25/80 Funded	Release Bonsall from $500,000 $91,000 to Mr. Russell plus loan costs and debt service set aside RT(8/27/84)24-25;(11/14/84)57	250,000* ** †	Newport Pacific Funding, Inc. RT(8/27/84)24	— —	Mrs. Galardi RT(11/14/84)26-27 Galardi RT(11/14/84)57-58, 76-78, 103
During State Court Arbitration of *Lerner* action RT(9/14/84)87	Bonsall debt service RT(9/16/83)74	92,000 RT(9/16/83)74	Newport Pacific Funding, Inc. (RT(11/14/84)87	— †	Lerner RT(9/16/83)74

Key: * Loans at issue per Review Department.
** Loans at issue per Panel.

(PROOF OF SERVICE BY MAIL — 1013(a) and 2015.5 CCP)

STATE OF CALIFORNIA
COUNTY OF LOS ANGELES } ss:

I, the undersigned, say: I am and was at all times herein mentioned a resident of the County of Los Angeles, over the age of eighteen years, and not a party to the within action or proceeding; that my business address is 1801 Avenue of the Stars, Suite 810, Los Angeles, California 90067; that on October 31, 1986, I served the within "Brief of Amicus Curiae;"

on the interested parties in said action or proceeding by depositing a true copy thereof, enclosed in a sealed envelope with the postage thereon fully prepaid, in the United States mail at Los Angeles, California, addressed as follows:

Supreme Court of the State of California
(0+10)
3580 Wilshire Boulevard, Room 213
Los Angeles, California 90010

Lawrence J. Galardi, Esq.
904 Silver Spur, Suite 291
Rolling Hills, California 90274

Herbert M. Rosenthal
State Bar of California
555 Franklin Street
San Francisco, California 93102

I am employed in the office of RAOUL D. MAGANA, a member of the bar of this court, at whose direction this service is made.

If an * is placed before any name, it denotes personal delivery instead of mailing.

I certify (or declare) under penalty of perjury that the foregoing is true and correct.

Executed on October 31, 1986, at Los Angeles, California.

MATTIE E. BOUNDS

APPENDIX I

IN THE SUPREME COURT
OF THE
STATE OF CALIFORNIA

In the Matter of

LAWRENCE J. GALARDI,

A Member of the State Bar.

PETITION FOR WRIT OF REVIEW

TO: THE HONORABLE CHIEF JUSTICE AND TO THE HONORABLE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE STATE OF CALIFORNIA:

Respondent Lawrence J. Galardi, a member of the State Bar, respectfully petitions for review following the decision of the Hearing Panel filed July 20, 1985 and the minutes of the Review Department, modifying said decision, filed February 25, 1986, and forwarded to the Clerk of this Honorable Court on March 7, 1986.

QUESTIONS PRESENTED

1. Where there is no substantial evidence of record that Respondent intended to, or in fact did, convert or misappropriate the property of another, has the State Bar met its burden and proved Respondent lacks moral fitness?

2. Is there substantial evidence of record that supports the findings and recommendations of the Review Department as it modified the decision of the Panel?

3. Should the Recommendations of the Review Department be refused and denied, and the recommendation of the Panel be followed, if the Supreme Court concludes some discipline is warranted?

TOPICAL INDEX

PETITION FOR REVIEW
QUESTIONS PRESENTED
TABLE OF AUTHORITIES CITED
STATEMENT OF THE CASE
SUMMARY
ARGUMENT:
THE ISSUE HERE IS WHETHER THE STATE BAR HAS PROVED BY CLEAR AND CONVINCING PROOF THAT RESPONDENT LACKS MORAL FITNESS.
THE FACTS

- A. RESPONDENT'S PERFORMANCE
- B. THE BORROWINGS SECURED BY RESPONDENT'S PROPERTY
- C. THE LERNER INTERFERENCE
- D. THE PARTNERSHIP ISSUE
- E. THE TRUST ACCOUNT ISSUE
- F. RESPONDENT ATTEMPTED TO SUCCEED WITH BOTH PROJECTS TO PROTECT COMPLAINANTS' PRINCIPAL AND RETURN.

I. IF THERE WAS A PARTNERSHIP WITH LERNER, THE LERNER/GALARDI PARTNERSHIP WOULD HAVE BEEN PLACED IN BANKRUPTCY.

II. THE FINDINGS, CONCLUSIONS, AND FINAL JUDGMENT ENTERED IN FAVOR OF RESPONDENT MAKE IT CLEAR THE TAYLOR AND LERNER CLAIMS ARE WITHOUT MERIT.

III. COMMINGLING ATTORNEY AND CLIENT FUNDS IS A FALSE ISSUE.

TOPICAL INDEX (Continued)

IV. THE BAD MOTIVES OF THE COMPLAINANT SHOULD BE CONSIDERED.

V. THE EXAMINER FAILED TO MEET THE BURDEN OF PROOF. THE DEPARTMENT RECOMMENDATIONS MUST BE DENIED.

VI. THE EXAMINER PREJUDICED RESPONDENT WHEN HE INCORRECTLY CHARACTERIZED IMPORTANT FACTS AND MISSTATED THE EVIDENCE.

VII. ASSUMING *ARGUENDO* THE PARTIES WERE "PARTNERS," THERE ARE MITIGATING CIRCUMSTANCES THAT WERE NOT CONSIDERED BY THE REVIEW DEPARTMENT.

VIII. THERE WAS NO INTENT TO DECEIVE OR WILLFUL MISAPPROPRIATION. RESPONDENT PERFORMED AS ALL PARTIES AGREED HE WAS TO PERFORM.

IX. THE GOOD CONDUCT AND OUTSTANDING RECORD ACHIEVED IN 27 YEARS OF PRACTICE IS MATERIAL AND SIGNIFICANT IN (a) WEIGHING CREDIBILITY; AND (b) CONSIDERING DISCIPLINE.

TOPICAL INDEX (Continued)

X. SHOULD THE COURT CONCLUDE SOME VIOLATION OCCURRED JUSTIFYING DISCIPLINE, RESPONDENT SUBMITS THERE IS: (a) A FAIR AND REASONABLE BASIS UPON WHICH TO CONCLUDE THE RECOMMENDATION OF THE PANEL IS SUFFICIENT IN THESE CIRCUMSTANCES; AND, (b) RESPONDENT HAS ENDURED SIX YEARS OF PROFESSIONAL AND SOCIAL OSTRACISM AS A RESULT OF THE FAILURE OF MALIBU PROJECTS TOGETHER WITH THE UTTERLY COMPLETE AND DEVASTATING ECONOMIC CONSEQUENCES OF THE REORGANIZATION AND THEN THE ORDER SOUGHT BY LERNER AND TAYLOR CONVERTING THE CHAPTER 11 TO A CHAPTER 7 LIQUIDATION.

CONCLUSION.

Appendix

Appendix A: Notice to Show Cause and Letter of Complaint.
Appendix B: Hearing Panel Decision.
Appendix C: Review Department Decision.
Appendix D: Professional Profile.
Appendix E: Findings of Fact and Conclusions of Law and Judgment Thereon.
Appendix F: Legal and Factual Reasons for Denial Asserted Before the Panel.

TABLE OF AUTHORITIES CITED

Cases

Page

Allen v. State Bar (1962) 58 C. 2d 912 26 C.R. 771 48

Ames v. State Bar (1973) 8 C. 3d 910, 921, 106 C.R. 489 ..... 41, 46

Barbie v. State Bar (1931) 213 C. 296, 300 46

Crawford v. State Bar (1960) 54 C. 2d 659, 669, 7 C.R. 746 45

Dermain v. State Bar (1970) 3 C. 3d 381, 388, 90 C.R. 420 45

Estate of Teed (1952) 112 C.A.2d 638, 644, 247 P.2d 54 5

Furman v. State Bar (1938) 12 C.2d 212, at page 229, 83 P.2d 12 33

Golden v. State (1931) 213 C. 237, at page 247 33

Gray v. State Bar, (1934) 2 C. 2d 226, 33 P.2d 1016 ..... 45, 46

Herrscher v. State Bar (1935) 4 C.2d at p. 834, 114 P.2d 832 ..... 33, 43, 45

Hildebrand v. State Bar (1941) 18 C.2d 816, at p. 834, 114 P.2d 860 ..... 33, 43

Honoroff v. State Bar (1958) 50 C. 2d 202, 210, 323 P.2d 45

McGrath v. State Bar, (1943) 21 C. 2d 737, 741, 135 P.2d 1 43

Pickering v. State Bar (1944) 24 C. 2d 141, 145 42

Price v. State Bar (1982) 30 C. 3d 537, 179 C.R. 914 ..... 41, 46

Resner v. State Bar (1967) 67 C.2d 799, 805, 63 C.R. 740 4

TABLE OF AUTHORITIES CITED

CASES

Page

Segretti v. State Bar (1976) 15 C. 3d 878, 888, 12 C.R. 793 ..... 41, 46

Shelly v. State Bar (1973) 9 C.3d 502, 509, 511, 108 C.R. 6 33

Signer v. State Bar, (1943) 21 C.2d 688, 690, 134 P.2d 757 45

Stanford v. State Bar (1940) 15 C.2d 721, at p. 727 32

Toll v. State Bar, (1974) 12 C. 3d 824, 832, 117 C.R. 427 41

Werner v. State Bar (1954) 42 C.2d 187, 265 P.2d 912 48

Yokozeki v. State Bar, (1974) 11 C. 3d 436, 450, 451, 113 C.R. 602 41

In re Andreani (1939) 14 C. 2d 736, 97 P.2d 456..47, 48

In re Dedman (1976) 17 C. 3d 229, 234, 130 C.R. 504 41

In re Fahey (1973) 8 C.3d 842, 848 45

In re Higbie (1972) 6 C. 3d 562, 573, 99 C.R. 865 .. 45

In re Jones (1971) 5 C. 3d 390, 400, 96 D.R. 448, 487 45

In re Kreamer (1975) 14 C.R. 427; 121 C.R. 600 ... 41

II.

CODES

Bankruptcy Code Section 11 U.S.C. 723 8

III.

TREATISES

7 Am.Jur. 2d, Attorneys at Law, sections 52 and 59 42

STATEMENT OF THE CASE

The State Bar initiated the within proceedings pursuant to a Notice to Show Cause[1] alleging violations of the Business and Professions Code and acts involving moral turpitude and dishonesty. The Decision of the Panel[2] and the Recommendations of the Review Department modifying that Decision, are before this Court on appeal.[3]

The State Bar did not, in its discretion, require the Complaining parties verify their allegations. The matter was heard before two Panel members on the basis of the Notice, the Response and numerous documents voluntarily produced by Respondent.[4]

The Review Department findings and recommendations are an extreme and unduly harsh increase in discipline over the private reproval recommended by the Panel. The Panel heard the evidence, and had an opportunity to observe the witnesses and determine credibility. There is absolutely no reasonable relationship between the record, the moderate discipline recommended by the Panel and the extreme and harsh discipline recommended by the Department. The Review Department findings and recommendations are not supported by substantial evidence.

The State Bar proceeded on the basis of two "counts". Count one alleged a joint-venture agreement with Lerner regarding property at Bonsall Drive. Count two alleged a joint venture agreement with Taylor regarding property

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[1]Appendix A.

[2]Appendix B.

[3]Appendix C.

[4]July 8, 1983; September 15, 1983; September 16, 1983; July 20, 1984; August 27, 1984; and November 14, 1984.

at Eagle Pass Drive. Both properties are located in Malibu, California.[5]

Respondent pleaded the legal and factual reasons for denial before the Panel. Please see Appendix F.

The Examiner urged there was an attorney-client relationship and a joint-venture and that Respondent was therefore a fiduciary. The Examiner argued and attempted to establish through the Lerners that monies were borrowed without the knowledge or consent of either and that the Galardi properties were encumbered by Galardi who used the loan proceeds for personal purposes.

The Examiner urged Respondent be disciplined for lack of repentance, because there was an attorney-client relationship and breach of duty under partnership law but failed to reasonably relate the facts at hand and ignored those facts that deny the existence of either a partnership or representation by Respondent of either Lerner or Taylor.

The Panel concluded there was no attorney-client relationship — notwithstanding the Lerner agreement — and found there was a joint venture and not a disguised loan, there were loans taken out without knowledge, and the money was not all used for purchase or improvement. The Review Department made new findings that loans were taken out and not used solely for purchase or for improvement, as required, and further, that "Respondent refused and still refuses to account for the disposition of the loan

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[5]No claim was made by Lerner or Taylor, in this proceeding, as to Respondent's 29 acre Malibu property. Earlier they had claimed an interest in that property, also, in order to attach it and prevent the refinance.

proceeds." The accounting was overlooked by the Review Department.

Those findings are clearly erroneous and are not supported by substantial evidence.

SUMMARY

Galardi was not a partner of either Lerner or Taylor. Galardi was not attorney for Lerner or Taylor and there was no evidence of an attorney/client relationship. Both Lerner and Taylor dealt with Galardi as an owner and developer on the basis of Galardi's credit-worthiness, Galardi's expertise and track record in Malibu development and Galardi's abilities to develop and market his properties, only. They investigated Respondent and his properties in precisely the manner of all commercial lenders, only they wanted more than 10% interest.

At every stage, Galardi sought to perform in accordance with his responsibilities to complete and sell, even after breach by both Lerner and Taylor.

The sum of the evidence equally supports the conclusion the parties were not partners.

The lawsuit and lis pendens wherein Taylor claimed an interest in the Galardi properties and the lawsuit and Writ of Attachment wherein Lerner claimed interests in all of the Galardi properties, were all instigated by attorney Richard Lerner out of motives of spite, and malice after Respondent refused to capitulate and pay them part of the refinance proceeds and deed an interest in the real estate, to them. Richard Lerner was attorney for both Lerner and Taylor at all pertinent times.

ARGUMENT

THE ISSUE HERE THAT MUST BE SUPPORTED BY CLEAR AND CONVINCING PROOF, IS WHETHER THE STATE BAR HAS PROVED RESPONDENT LACKS MORAL FITNESS.

The bottom line issue in this appeal is moral fitness. The inability to make restitution is not a proper test for demonstration of rehabilitation.[6] It cannot reasonably be a test of moral fitness especially in circumstances like these where all assets were lost as an outgrowth of conduct of the complainants. It does not appear to be reasonable or logical to require restitution as a condition of limiting discipline where there is no means or ability to restore. Nor is it reasonable to establish restitution as a condition, as it were, to measure moral fitness and at the same time take away any and all means of earning a livelihood. The recommendation of the Review Department is not susceptible of performance. It is not supported in the record[7] and it should be denied for the reasons that hereinafter appear.

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[6]See, *Resner v. State Bar* (1967) 67 C.2d 799, 805, 63 C.R. 740.

[7]There must be substantial evidence, i.e., evidence of "preponderable legal significance . . . The word (substantial) cannot be synonymous with 'any' evidence. It must be *reasonable* in nature, *credible* and of *solid value*; it must actually be substantial proof of the essential details which the law requires in a particular case. *Estate of Teed* (1952) 112 C.A.2d 638, 644, 247 P.2d 54. The Lerner charges have led the Review Department to conclude on the basis of inherently improbable inferences when measured in the light of reasonable business practices. And, its findings are of insufficient substantiality to support a judgment.

THE FACTS

Respondent has had a distinguished career of 27 years as a trial lawyer in the practice of aviation law, products liability and general civil trial practice.[8]

In 1971, Respondent began the development of property in Malibu. Respondent was fortunate to develop a notable track record with substantial successes and with absolutely no partners, at any time.[9] Respondent purchased the Bonsall property opening Escrow in July of 1978 and closing that Escrow on December 6, 1978. During the Escrow period, Respondent needed loan funds. Respondent approached several individuals who had loaned funds in the past and approached Bernie Lerner at the suggestion of John Taylor. Earlier, Respondent had entered into an agreement with Taylor (October 1977) where Taylor as contractor agreed to build out residential estates on two of Respondent's properties (Eagle Pass and the 29 acres) (Exhibit 1). Taylor was to receive a 25% interest in the profits, if any, resulting from the sale of the Eagle Pass property, only. Both properties were owned solely by Respondent. Taylor had no equitable interest in Respondent's real property. The funds paid by Taylor to Respondent were not paid for the purpose of providing either purchase or working capital for the

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[8]Admitted to practice in New York in 1959 and in California in 1971. A detailed Biography and Professional Profile of 16 pages was received in evidence and is attached hereto as Appendix D for ease of reference.

[9]At the time of the refinance in 1980 (stopped by complainants) Eagle Pass, purchased for $100,000 had been built out and was in escrow for $3.4 million. Bonsall, purchased for $285,000 was worth $750,000. Eagle Pass had $1.2 million against it and Bonsall had $450,000 against it. Bonsall was to be marketed for $1,750,000 upon completion with costs of about $650,000.

construction and development of Respondent's property. Taylor knew that and so testified (Exhibit "K"). Galardi already owned the property contrary to the Department's findings. The findings below, to the contrary, are utterly without evidentiary support.

A trial court concluded there was no partnership and no fiduciary relationship and Taylor had no interest in Respondent's properties. The Panel knew that. Presumably the Review Department considered that. In any case, the findings and conclusions below are based upon (a) a "joint venture" or "partnership" that was earlier adjudicated and found not to exist; (b) an alleged beneficial or ownership interest that similarly was adjudicated and it was fully and finally determined that *it* did not exist; and, (c) an "implied duty" that according to the Review Department resulted from these purported relationships. Its recommendation therefore must be reversed here on review as it is in error as a matter of fact and law.

If the evidence supports both views, the conflict must be resolved in favor of Respondent.

The Taylor Agreement bears upon the Taylor introduction to Lerner and the Lerner agreement because Richard S. Lerner was Taylor's lawyer. And, the Review Department erroneously relied on the Taylor agreement in concluding a partnership between Taylor and Galardi and Lerner and Galardi. (But see, Exhibit K, Appendix E).

Taylor spoke with Lerner about the 1977 contract. Lerner later instructed Taylor to pull off the Eagle Pass job when Lerner tried to hold Respondent up for a "piece of the action". In June 1980, Lerner threatened Respondent with litigation if Respondent did not deed interests to Lerner and Taylor. Law suits were filed and a lis pendens was recorded on behalf of Taylor by Lerner.

Thereafter, Lerner secured a Writ of Attachment and Lerner tied up each of Respondent's *three properties* on behalf of his clients Lerner and Taylor with the result that necessary refinancing was prevented, a sale was interfered with and Respondent was forced to file for a Reorganization and place all of the Galardi properties in personal Bankruptcy in January 1981.

It was a personal bankruptcy filing involving only Respondent's assets and his wife's assets. Respondent and his spouse were represented in the Bankruptcy by Irving Sulmeyer of Sulmeyer, Kupetz, Baumann and Rothman.

The Bankruptcy proceedings initiated by Respondent were not on behalf of any partnership. Respondent and his counsel did not seek to place a purported Galardi/Lerner partnership or a purported Galardi/Taylor in Bankruptcy. Had there really been a partnership as Lerner and Taylor claim here, those partnerships would have been placed in Bankruptcy rather than Respondent's personal assets. It is simply not reasonable to conclude otherwise.

The unsecured creditors in the Galardi personal bankruptcy, placed the purported partnership of Lerner and Galardi in an Involuntary Chapter 11 Reorganization pursuant to 11 U.S.C. 723. The Court dismissed that proceeding because there was no partnership and there was no joint venture. That constituted a final adjudication.

The unsecured creditors in the Galardi personal Bankruptcy also placed the purported partnership of Taylor and Galardi in an Involuntary Chapter 11 Reorganization pursuant to 11 U.S.C. 723. The Court dismissed that proceeding, too, because there was no partnership and

there was no joint venture. That adjudication was also final. The Court ruled there was no partnership or embezzlement or misappropriation.[10]

It would be neither fair nor reasonable for this Court to conclude on review that there was a partnership between Lerner and Galardi and Taylor and Galardi when the Bankruptcy Court concluded otherwise with all parties and all evidence before it and after full and complete hearings.

The Court must conclude, Respondent submits, that motives of spite, and malice prompted the Lerners and Taylor to complain to the State Bar and seek to use the power of that body to make good on their threats and blackmail.

It is indeed unfortunate that the Galardi projects were not sold at a profit but the combination of the tight money conditions in 1979-1980 and the interference of attorney Richard Lerner on behalf of his clients, caused the difficulties in refinancing according to plan and in completing the sale.

Lerner had negotiated and in effect entered into the agreement with Galardi on behalf of his brother. Without reiterating the evidence of interference by Lerner and his attempts to pressure Respondent into giving up an interest in his properties to both of Lerner's clients, several things appear. It is clear that Lerner at least found himself in a position where he believed himself responsible for his brother's losses, rightly or wrongly. That's true as to Taylor as well. Lerner filed suits and recorded lis pendens premised on his claim that Taylor and Galardi were partners, and, that was not true. Against that back-

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[10]Appendix E.

ground of failure it isn't difficult to understand Lerner's venomous behavior. His vast ego was visible in the Hearing Room and it is memorialized in the transcript. It surfaced repeatedly during the events that are memorialized in the evidence here, in his ineffectual complaints to the District Attorney and to the Bankruptcy Court. That conduct was arguably irrational. It has proven to be not supportable and the District Attorney and the Bankruptcy Court, so found. This Court should not dignify his scurrilous accusations and behavior. And, the Department's recommendations are premised upon the same record, a record that simply does not clearly and convincingly support a finding of fiduciary duty or willful conversion or misappropriation of someone else's property.

That simply is not supportable in this record. At best there is only evidence that it was utter foolishness to deal with Lerner and to doubt and disbelieve Lerner's ability to distort the truth. While there may not be an endless succession of letters from Respondent memorializing each and every conversation and meeting with Lerner and Taylor, the uncontroverted events and physical improvements are evidence that both had complete knowledge. The Eagle Pass job was on a voucher system. Taylor was paid out of borrowed monies. Lerner repeatedly witnessed the construction. A complete breakdown and accounting of loan proceeds, costs of points, fees, interest, payments and construction costs was received in evidence. The Review Department findings that Respondent failed and refused to account are clearly erroneous.

The Department (not the Panel) suggests Respondent does not exhibit remorse. That is utterly without merit. Had Lerner not interfered they would have made the substantial profits that the parties had agreed upon. Respondent has repeatedly exhibited remorse over the

loss to the complainants. Respondent's remorse over that failure having once taken the obligation to produce those profits should not require further explanation. Respondent hereby again expresses his remorse that both Lerner and Taylor did not profit. And, there is remorse over permitting Lerner to succeed to the extent that he did, but the circumstances could not be controlled once he interfered and filed the false claims of partnership and joint venture. Those law suits on behalf of both of his clients placed Respondent in a position from which he could not recover although the attempt to recover continued until last year when Eagle Pass was finally foreclosed. Respondent had no reason to want to see Lerner and Taylor lose their principal or their return on that money. That meant Respondent would lose and it meant Respondent would fail to produce the profits that both he and they anticipated. How else can the remorse over witnessing Lerner achieve the evil success he embarked upon, be expressed. The suggestion of lack of remorse is founded first upon a relationship that did not exist and then it requires proof that Respondent intended to harm the complainants and himself.

And, with regard to restitution, Respondent is constrained to ask, how can restitution be provided, and from what? The personal Bankruptcy and liquidation forced by Taylor and Lerner who were creditors, took everything and their conduct was reprehensible, unfair and unreasonable. There is nothing to repay in these circumstances and if there was, there is nothing left to pay it with. In that regard, the suggestion made at the Review Department hearing (by the Examiner) and the Department's recommendation is totally unrealistic. No money was secreted. The increased penalty of suspension as opposed to private reprimand would effectively foreclose any income. The perpetrators of this manifest injustice have,

out of malice, greed and spite, caused the loss of all of Respondent's assets and the legally and factually unsupported recommendations of the Review Department now threaten to further compound that injustice. That must not be countenanced by this Court on review.

A. RESPONDENT'S PERFORMANCE

Respondent gave Lerner a receipt for $101,000, (through the agreement of December 1, 1978) when Lerner actually advanced $91,000. The remaining $10,000 was ultimately advanced after substantial delays and after a promissory note was given and collected.

$10,000 went to attorney Richard S. Lerner as a finder's fee. His client-brother learned he was paid the finder's fee in January 1981 (two years later) during the arbitration proceedings.

The Lerner Agreement lacked mutuality. It was drafted to accomplish a purpose other than as stated, i.e., to avoid the consequences of a usurious transaction. That was wrong. But it does not constitute moral turpitude and it did not result in any enrichment or secret funds or private profit.

It was not a security agreement. It was not a partnership agreement and it was not and cannot be construed as a limited partnership agreement. Furthermore, the parties changed it, orally, from time to time.[11] Against that factual background it was clearly erroneous for the Re-

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[11]The changes that were made and upon which there was performance included:

(1) Galardi was not "attorney";

(2) Lerner was not "client";

(3) Richard Lerner was attorney for client Bernie Lerner, as well as real estate broker;

view Department to rely on its express language and ignore the evidence of what the parties had agreed to and their performance.

There were no indicia of partnership, no tax returns, no joint decisions and no holding-out.

The property (Lerner Agreement) was Respondent's property and Respondent had exclusive control, including control over financing, and building. All interest and the costs of all financing were charged to Respondent. Respondent was an owner, Taylor and Lerner were builders and lenders. The sale price intended for the "remodel", only, was always a variable. Lerner had a right to, in effect "call the loan", after 18 months. But, that part of the agreement was modified as it did not initially contemplate the subsequent change wherein it was orally agreed

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(4) The "remodel" was expanded in 1979 to include construction of a manor house; that required additional funds be borrowed;

(5) A tennis court, swimming pool and stables were to be built in addition to the remodel;

(6) $101,000 was not paid although it was receipted for;

(7) $10,000 was paid later, in installments;

(8) $10,000 was paid as a finder's fee to attorney Richard Lerner; it is not mentioned by Lerner;

(9) No representations of legal skill were made to anyone in connection with the Bonsall construction or any other construction in which Respondent had been engaged;

(10) There were no acts as a fiduciary either undertaken or embarked upon;

(11) Lerner sold carpet to Respondent for use at Bonsall;

(12) Richard Lerner offered Bonsall for sale without the required written authorization to do so, in July 1980;

(13) One-half of the interest and real estate tax deductions were given to Lerner at his request in 1979;

(14) Each of the foregoing was accomplished without the benefit of a written modification, as required by the terms of Lerner's Agreement.

in 1979 to extend in order to build a large estate with a manor house. Thereafter, the 18-month option to call the loan was no longer part of the agreement. The fact that the agreement was changed in that manner, cannot be disputed. There were initial plans in 1979 and then later, agreement regarding the so-called "White Plans" for the manor house. The location of the swimming pool is further evidence of the intention to extend so as to do more than simply remodel and sell.[12]

The Lerner money was not given for the sole purpose of purchase and construction. The Departments' finding is clearly erroneous. Respondent was free to use what he needed to close the purchase Escrow ($75,000) and the balance of the funds went to Respondent. This was clearly a disguised loan. Title was in Respondent. There was no joint control. There were no partnership tax returns contemplated or filed. All costs, interest and charges regarding all purchase money financing and all construction financing was Respondent's responsibility. Respondent was to "do his own thing," according to Lerner and return more than just legal interest on the money.

There was no provision for the sharing of losses. The Review Department recommendations fail to recognize that partners share losses if they intend to be partners. This was not a limited partnership. It was a loan.

There was an agreement to share profits, if any, and that agreement provided the bonus to Lerner over what otherwise would have been only interest on a loan. The principal amount was to be repaid. It was not at risk as in a joint venture.

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[12]The pool would not have been located 200 feet from the existing house unless it was for the stated purpose of locating it in close proximity to the newly agreed upon manor house.

The borrowing by Respondent was secured by Respondent's property. The testimony reveals each and every loan was discussed with complainants. Respondent's creditworthiness and Respondent's track record were what Lerner was interested in without having any interest in the property, liability for the loans or responsibility for the construction or marketing.

Lending institutions, daily, rely upon this same indicia of creditworthiness when they make loans, and they are limited to recovering interest, as their return on investment. Here, Lerner bargained for a share in the profits in order to increase that return.

Respondent communicated with the Lerners about the Bonsall construction and each loan was discussed with Lerner prior to the property being encumbered. They lied when they testified they had absolutely no knowledge for a year and a half. That is not credible on its face.

The agreement required Respondent obtain $100,000 within six months to commence the remodel. Had those funds not been obtained and the remodel begun and had Respondent not communicated with Lerner it is reasonable to conclude there would have been some complaint by Lerner to Respondent at the end of six months. The passage of time when the lending was accomplished, is further evidence that the Lerners were kept informed with regard to both construction progress and loan progress. The Lerner testimony that they knew nothing of the borrowings was contrived. They had a continuing knowledge of both the progress in the construction and Respondent's progress in obtaining the combined equity loan that was providing the construction money for the build-out. Erroneous information developed by Richard Lerner in February 1980 that Bonsall was security for a $500,000 loan was corrected by Respondent, at that time.

Full information of the success in obtaining further advances on the combined equity loan was given the Lerners and Taylor. As aforesaid, the borrowings and Respondent's creditworthiness were needed for purposes of securing the money for Bonsall construction as planned, since the value of Bonsall alone was insufficient to secure the money necessary to build it out as an estate. The Examiner's ingenous suggestion below that millions could have been placed by Respondent against Bonsall to defeat the Lerner interest in the profit is ludicrous and utterly without merit. It reflects the total lack of understanding of the leveraged real estate transaction all of the parties were participating in. It is an erroneous premise in the light of Respondent's successful track record developing Malibu property. It also completely disregards the Lerners' and Taylor's testimony that they were relying upon that track record just as any lender would. The facts are that Respondent was using Respondent's properties to secure adequate financing. That was what everyone agreed to when the loans were made.

Respondent planned to and did in fact use Eagle Pass and the 29 acre properties as well as Bonsall in the borrowing program. Respondent's wife jointly owned the 29 acres. Both Lerner and Taylor knew this at every stage and because of the values of the respective properties, they were confident that Respondent's development plans would be financed and completed. They not only did not complain about the cross-collateralization, they relied upon it.

They wanted a "piece of the action" when they learned the money was available. Their greed surfaced. It was either pay off Taylor and Lerners' extortion or deed them an interest in Respondent's properties. I harshly declined.

B. THE BORROWINGS SECURED BY RESPONDENT'S PROPERTY

Respondent arranged to borrow $60,000 in July 1978 before the purchase of Bonsall was completed. (This was in addition to the $200,000 purchase money financing.) The loan was funded after the purchase was completed. Then $50,000 was borrowed and Bonsall was security for a $200,000 first and $110,000 in a second and third. Thereafter, a loan in the amount of $100,000 was borrowed reducing the total borrowings to a $200,000 first and $100,000 second. Then, a loan of $250,000 was taken out, secured by Bonsall, with total loans of $200,000 and $250,000 as of June 1980. By that time construction had proceeded at Bonsall with a remodel of the existing house, tennis court, swimming pool, perimeter estate fencing and landscape over the entire two acres. That construction cost money. Loan proceeds after the deduction of interest charges were also used to pay off the $100,000 previous loan on Bonsall and $90,000 owed on Eagle Pass. A loan of $800,000 was scheduled for August 1980. That loan was to be secured by Eagle Pass. A subsequent refinance and Respondent's and his wife's 29 acres provided construction money for both Eagle Pass, the manor house planned at Bonsall and the first house on the 29 acres. The record reveals the Taylor agreement was to build the first house on the 29 acres.[13] Grading and site preparation had already been accomplished by Respondent in 1977 and 1978.

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[13]Taylor's bank provided $800,000 of the financing for Eagle Pass. He attended when loan documents were signed, meetings with officers and he was at the property when bank representatives visited. The Review Department finding that he "did not know" is clearly erroneous.

An accounting was prepared. Each loan and proceeds distribution is set forth in this record. The Department's finding to the contrary is clearly erroneous.

C. THE LERNER INTERFERENCE

In June 1980 the Lerners stated that they were not going to go through with the agreement. In late June and July 1980, Richard Lerner stated that he wanted a "piece of the action", as he put it, for both Taylor and his brother Bernie. The timing was such that the 18 months originally provided in the Lerner agreement for the remodel, was soon to expire. The Lerners reneged on their oral agreement regarding construction of the manor house and they threatened to prevent the other development of Respondent's properties by interfering with the combined equity borrowing program. Lawsuits were filed in June 1980 on behalf of Taylor and Lerner. Threats were made with regard to those lawsuits and Writs of Attachment in the event Respondent did not acquiesce and deed interests to Taylor and Lerner.

Respondent refused.

A Writ of Attachment was obtained and a lis pendens was recorded, on all three of Respondent's properties *and that of his wife.* Mrs. Galardi was not a party to the agreement. Claims of partnership and ownership interests were relied upon as to all three properties, in granting the attachment and in recording the lis pendens.[14]

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[14]In order to provide some continuity of thought regarding the effect of these claims of partnership, the Court is asked to note that it was not until December 1983 that the property rights were adjudicated and it was established that *Taylor was never a partner* and never had any rights or interests in any properties owned by Respondent. The within proceeding had been initiated by Lerner's Complaint, asserting partnerships, in 1981. The personal Bankruptcy (no

In August 1980 after Richard Lerner obtained the Writ of Attachment as to all of the Galardi Properties, he called the lender involved in the $800,000 refinance of Eagle Pass and claimed his clients, Lerner and Taylor were owners of the property. The lender backed out. Then, in November 1980 Lerner interfered with the refinance by Cambridge Capital Group in the amount of $2,350,000.

On Janaury 20, 1981 Respondent was forced to file a Chapter 11 Reorganization when he learned of a threatened forced sale of the Eagle Pass property in violation of an extension of time earlier agreed upon.

Lerner sued both Galardi and Taylor when he represented Taylor. Taylor had signed the contract to purchase the carpet from Lerner, upon which the suit was based. The purchase of carpet was from Lerner's Home Furnishings, a Lerner family-owned business.

Lerner pulled Taylor off the Eagle Pass job. Later, although he represented him, Lerner said Taylor would have to "fend for himself" during the Arbitration Proceeding when he was then dealing for his brother Bernie. Lerner's conflicts throughout are a matter of record below.

Lerner charged "embezzlement" by Galardi in the Bankruptcy proceedings at a hearing when Galardi sought refinance approval of the Court. (November, 1982)

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partnerships were involved in the Bankruptcy filing) was filed in January 1981. *In November 1982 Lerner and Taylor denied they were partners.* The Examiner's brief, in January 1981 again asserted there was a partnership, however. That assertion was made again in 1984 and in 1985. Nothing had changed in the facts, except, these false claims have caused Respondent financial ruin in the interim and they now threaten to place Respondent's law practice in jeopardy. Respondent respectfully submits the manifest unfairness, in these circumstances, should not be countenanced.

Taylor, (the builder) moved to convert the Galardi Chapter 11 to a Chapter 7 liquidation. Taylor did not understand that it was not in his interest to do that. At the time he was represented by Richard Lerner and attorney Marc Zegar. That motion was made in July 1982 almost one year after Lerner's call to Taylor instigating Taylor's complaint to the State Bar about the purported Taylor/Galardi partnership. *Taylor later denied the partnership.* Lerner complained to the State Bar about the purported Lerner/Galardi partnership and then he was instrumental in denying that same partnership on behalf of his brother. This Court should measure those lies and their motives in reviewing the harsh discipline recommended by the Department as distinguished from the Panel findings.

In all of these matters Respondent submits, Exhibit "K" in these proceedings reveals there was no Taylor/Galardi partnership. Taylor had no interest in the Galardi properties and Respondent did not misappropriate, convert, embezzle or steal any property interests of Taylor as alleged by Lerner and as argued by the Examiner before the Panel. The Review Department action of increasing the recommended discipline on this record is without substantial evidence.

D. THE PARTNERSHIP ISSUE

The facts simply do not support a finding of Partnership. While the claims of Lerner and Taylor have varied according to what was convenient and what was supportive of what they were seeking to accomplish, the facts have not changed. The cases relied upon by the Examiner before the Panel are of no moment, if there is no partnership.

It is urged by the Examiner that there need not be joint ownership or joint control. In fact, there was neither, here. The money paid was allegedly solely for purchase and improvement. That is not supported in the evidence. Exhibit "K" dispels that entirely as to Taylor. Exhibit 1 and Exhibit 4 do not so provide. The Agreement provides for the payment of $101,000. It does not provide for the payment of a finder's fee and it does not designate some monies for acquisition and other monies for construction. Only $75,000 was needed to close, and all parties knew that *before* the agreement was signed and before the closing. Lerner did not ask that $15,000 be "returned". He stood at Respondent's side when the balance was deposited with his understanding, openly and with his agreement, in Respondent's own account. He did not complain about that until over two years later and that is clear in the record. The Review Department findings that *imply* contrary facts are erroneous, and Respondent submits the conclusions that are boot-strapped are erroneous as a matter of law.

The Examiner alleged and the Review Department was persuaded, both parties intended a joint venture, and that the Taylor agreement was titled "Joint Venture Agreement" (Examiner's Brief, page 3). Neither is true. The Examiner asserted there was provision for sharing losses. (Examiner's Brief, page 9). That is not true. (Exhibit 1 and Exhibit 4.) The Examiner urged a single enterprise was contemplated in Taylor (Examiner's Brief, page 9). That is not true. He was to be contractor on three properties. It says so in plain English.

The Examiner urged that because money was "lost" there was a "sharing of losses" (Examiner's Brief, page 9). That semantic exercise is utterly without merit. There is no provision in either agreement for sharing losses and

the play on words suggested by the Examiner is specious. That rationale is at once both sophomoric and irresponsible and should not be countenanced. Again, Respondent respectfully submits he has never as a matter of practice or advocacy in 27 years of trial practice indulged in *ad hominem* as a tactic for persuasion; but, the matter at hand has at its core the principal of attorney's responsibility. No less a standard should be expected or exacted from the representatives of the State Bar. That is true whether the Court focuses on the over-zealous advocacy of counsel before the Panel, reliance upon cases not reasonably related to the factual issues, the excesses in argument upon review, or, the cavalier willingness of the Department in ignoring Lerner's lack of credibility. The Examiner argued Taylor had a right to control (Examiner's Brief, page 10). That is completely without support in the language of Exhibit 1, in the conduct of the parties, or the expectation of the bank lenders.

E. THE TRUST ACCOUNT ISSUE IS MAKE WEIGHT

Respondent testified and it was not controverted, about the deposit of the check for $91,000 and the contemporaneous withdrawal of those funds in Lerner's presence and with his acquiescence. That occurred on December 1, 1978. Earlier the same day, Lerner instructed Bernie Lerner to make the check payable to Respondent's Professional Corporation Trust Account. That was his unilateral decision. Respondent voiced his objection to that Lerner said take it or leave it. Respondent insisted Lerner accompany him to the bank to negotiate the check and transfer the funds to Respondent's personal account. Richard Lerner had told Bernie to do it that way, so it was not even the subject of an agreement between Bernie and Respondent.

Everything Respondent did was *completely in the open and with full knowledge of all the parties.*

There was absolutely no showing of any intent to misuse the Trust Account.

If Richard Lerner did not in fact agree (and there is no suggestion that he did not in fact agree) then, his conduct on December 1, 1978 constitutes a fraud and sham and entrapment calculated to create false issues for later litigation. Or, to force the negotiation of a different and better deal than the deal originally agreed upon. That, is exactly what transpired.

The State Bar Notice alleges Bernie relied upon Respondent's representations. In fact, all of the evidence reveals he *did not rely* because Richard Lerner told Bernie how to draw the check and Richard told Bernie how Respondent was using the money, with the notable exception of a payment of a finder's fee to Richard Lerner. And, if Richard Lerner gave Bernie a different account of what occurred and Bernie relied on that account then Respondent cannot be responsible for Richard's conduct. If Bernie is to be believed, in this contrivance regarding Trust Funds, the basis for his conclusions was what his attorney Richard Lerner told him and not what Respondent told him.

F. RESPONDENT ATTEMPTED TO SUCCEED WITH BOTH PROJECTS TO PROTECT HIS EQUITY AND COMPLAINANTS' PRINCIPAL AND RETURN, EVEN AFTER RICHARD LERNER CHANGED THE DEAL

Despite the sham agreement to avoid the consequences of the usury laws, the payout of profits was structured so that all parties would profit. Bonsall, alone, was of insufficient value to support the construction loans needed, as

aforesaid. Everyone knew that. The Review Department ignored that fact. Thereafter, the leverage by Respondent of Respondent's creditworthiness and other assets through cross-collateralization was sufficient to make the project work when money became available in 1980 and the combined equity loan was in progress. The parties relied on the cross-collateralization. That was part and parcel of Respondents' creditworthiness and his ability to borrow enough to build Bonsall in spite of its limited initial loan value. Lerner has contrived to turn that around now, almost five years later.

Respondent never sought rescission. Only after the suits instituted by Richard Lerner and the Lerners' "pulling the rug out" (their characterization), the failure of the Eagle Pass sale and the interference by Lerner, did Respondent place himself and his *peresonal assets in a personal Bankruptcy.*

I

IF THERE WAS A PARTNERSHIP WITH LERNER, THE LERNER/GALARDI PARTNERSHIP WOULD HAVE BEEN PLACED IN BANKRUPTCY.

Clearly, Respondent dealt with the situation honestly and persisted in trying to save, to reorganize and to do the right thing in spite of Richard Lerner. The Review Department misconstrues and urges Respondent has no remorse and has not offered restitution or repayment. Respondent is forced to inquire, in these circumstances, restitution for what, and out of what fund and which assets? Would it be restitution of a partnership share? There was no partnership. There was no partnership with Taylor. Neither Taylor nor Lerner had any responsibility for the borrowing. The assets at risk were Respondent's. The risks of both Lerner and Taylor were limited to what

they advanced, $101,000 and $85,000, respectively. And, those principal amounts were to be repaid just like any loan. The sale, at $3.4 million interfered with by Lerner would have netted Taylor over $660,000 on the basis of the Taylor/Galardi agreement together with a contractor's fee of over $70,000 on Eagle Pass alone. That is without consideration to the agreement, i.e., Taylor's agreement, to build out the first house on Respondent's 29 acres and to complete the electrical at Selfridge. Lerner actively was not acting in Taylor's interest when he dealt for his brother on Bonsall.

Lerner put up $101,000, $10,000 of which came back to his brother. A sale of the Bonsall property at $1,750,000 would have netted Bernie in the order of $551,000 applying the Lerner schedule in the Lerner Agreement, assuming costs of $750,000, a profit of $1,000,000 and a commission to Richard Lerner of $52,500. Instead, complainants wanted more, Respondent refused and Lerner and Taylor forced the personal Bankruptcy and Taylor, as a creditor represented by Lerner, forced the liquidation in Chapter 7.

The total appraised value of the Galardi properties was over $6.5 million at the time. To suggest now that Respondent refuses restitution against the background of (a) having lost over $6.5 million in assets as a result of the conduct of Lerner and Taylor; and (b) having nothing left and only limited ability to earn, is neither fair nor reasonable. It is not realistic and it disregards the first hand ability of the Panel to weigh credibility, factors in mitigation and Respondent's record of services as an attorney.

II

THE FINDINGS, CONCLUSIONS AND FINAL JUDGMENT ENTERED IN FAVOR OF GALARDI MAKE IT CLEAR THE TAYLOR AND LERNER CLAIMS ARE WITHOUT MERIT.

To suggest now there is no "remorse" against the background of repeated efforts to save the properties for the benefit of all of the creditors (including Taylor and Lerner) and the persistent efforts to refinance and sell the properties so that there would be profits available, is neither fair nor reasonable. Respondent has been unfairly dealt with.

There has been no vacillating conduct, no evasive testimony and there has been no lack of candor. Respondent, unfortunately, was and is forced to appear *in pro per* because of financial hardship. Respondent freely and willingly produced hundreds of pages of well-organized documents. Respondent's position in these proceedings is completley and totally consistent with everything that has come before in the personal Bankruptcy, the Arbitration and the State Court litigation. Exhibit "K" reveals there was no truth in the Lerner allegations made on behalf of Tayor. It was Lerner that charged Respondent embezzled funds. It was Taylor, at Lerner's instance, who forced the liquidation. The liquidation has resulted in there being absolutely nothing available for restitution. The recommendation of the Review Department is totally without reasonable basis. The Panel recommended Respondent be privately reproved in recognition of all of the circumstances, as it perceived them, after listening to him and observing the Lerners.

The Examiner urged Respondent has done nothing in mitigation of the loss. That is utterly without foundation

in the evidence. Respondent has sought to protect the properties from loss at every stage and has failed because of the spurious claims made by Taylor and Lerner. All of the creditors and Respondent have sustained losses in varying amounts as a result of those false claims. No other creditor has joined Lerner or Taylor, here.

The Examiner has utterly failed to prove any intent to cheat, or to misappropriate or misuse funds. The Review Department used the Taylor agreement to prove the Lerner agreement established a partnership. There was no partnership with Taylor, however (Exhibit "K") and the analogies falsely drawn in favor of the spurious claims of Lerner must similarly fail.

Clearly, the Lerner agreement is not a limited partnership as it does not meet the requirements of the California law, nor was it intended to. It is not a joint venture or partnership as the elements of partnership and joint venture do not appear in these circumstances. It is certainly not a security agreement. It is, Respondent submits, exactly what it is, a sham agreement drawn and entered into in order to avoid the consequences of an otherwise usurious transaction. It was entered into in order to increase the return to Lerner by permitting an interest in the profits. Respondent never sought to avoid that agreement or rescind that agreement for reasons of usury or for any other reason, favoring instead to attempt to save the construction projects and produce the profits Respondent agreed to try to produce.

With regard to the conduct of the Examiner and the clearly erroneous allegations made in the Notice to Show Cause (Appendix A), Respondent respectfully submits, the failure to require a vertification of the Complaints by Taylor and Lerner is arguably responsible for the allegations being permitted to proceed without adequate pre-

liminary investigation. It became clear, in the record during these proceedings, that the Examiner was relying upon Richard Lerner in the preparation and conduct of his case. The Examiner's brief reveals a total disregard of facts and reliance upon the spurious claims made by Lerner and Taylor. Respondent is constrained to state the Examiner breached his duty when he raised false issues in this quasi-criminal proceeding in totally ignoring Exhibit "K", in pursuing the attorney-client relationship that never existed, in ignoring the accounting, the construction, the low loan value of Bonsall and the parties' agreement to the need to cross-collateralize.

The Examiner obviously concluded there was no attorney-client relationship. He knew that, however, before any testimony was taken. There was no limited partnership; and, there was no intent to misuse trust accounts. The Examiner learned the properties were Respondent's and the funds borrowed were Respondent's to use as Respondent's funds.[15]

There is no basis in anything the Examiner reviewed below or before the Department that would permit him to reasonably conclude Respondent wanted to lose $6.5 million worth of property, or not accept the refinances, or the sale he had negotiated. The Examiner's case is not reasonable, just as Richard Lerner's private spite and malice defies reason. No one can reasonably conclude he acted on behalf of his clients (certainly not Taylor) in a way

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[15]The Examiner was aware of the Taylor proceedings that resulted in Exhibit "K" and the Examiner was aware of Exhibit "K", entered in December 1983. The Examiner knew the $91,000 was transferred immediately in Lerner's presence and Lerner did not object or "complain" until two and one-half years later. *The Examiner also knew that Lerner told the State Bar that Respondent was his attorney. That lie alone, should have tempered his zeal.*

calculated to protect and preserve their opportunity to share in the profits or to preserve the property. His conduct did not serve to advantage his client Bernie. The only explanation that makes sense is that once Richard Lerner committed himself to the course of action calculated to get a "piece of the action", he was irrevocably committed to a course of economic duress and blackmail and that is what all of his threats, lawsuits, Writs of Attachment and lis pendens were, pure and simple. And, Respondent refused his demands. It was simply impossible to then believe that he could successfully distort what was agreed to and what transpired. Then he complained to the State Bar.

If Respondent is guilty of anything it is of not writing more letters and memorializing what occurred. It should be clear, however, Respondent was (1) occupied in performing and getting the residential estates completed during what were incredibly difficult times, and (2) that Respondent in retrospect paid insufficient attention to the Richard Lerner contrivances. His contrivances at the time seemed sophomoric and had little meaning when weighed against the real problems of obtaining financing and doing what Respondent agreed to do, namely build and market Respondent's properties and share the profits with Lerner and Taylor in return for the monies they had loaned. Today, in retrospect, the contrivances of Lerner have taken on a new light. Perhaps, Respondent should have seen reason to rescind the Lerner Agreement but Respondent had borrowed $101,000 and had undertaken the obligation to pay it back (Ex. 4, paragraph 4b) together with a share of the profits, and that is what Respondent tried to do.

At no time in Respondent's 27 years of practice have attorneys with Richard Lerner's propensities surfaced,

let alone enjoyed the misplaced recognition, approbation and success implicit in the Examiner's prosecution and in the Review Department's erroneous findings.

III

COMMINGLING ATTORNEY AND CLIENT FUNDS IS A FALSE ISSUE.

The State Bar has not specifically pleaded commingling. The Examiner urged, however, that Respondent commingled client funds with attorney's personal funds and the Review Department so concluded. But, there was no attorney-client relationship, and there was no intent to commingle. The entire transaction was accomplished openly. The Examiner has failed to prove either premise and there is no basis therefor to conclude. The mere fact that Richard Lerner unilaterally instructed Bernie to draw the check payable to the Respondent's Professional Corporation Trust Account does not and should not alter the character of the funds paid to Respondent, by that check. The Lerners knew only $75,000 was necessary to close the escrow and the balance of Respondent's funds were being placed in Respondent's account. Lerner raised no objection until two and one-half years later (June 1980) when the litigation was first contrived and filed.

The mere passage of time is conclusive evidence of the contrived nature of the Lerner claims.

Respondent further submits there was no technical violation and it certainly did not involve moral turpitude.

Moral turpitude is an act "contrary to honesty and good morals", *Stanford v. State Bar* (1940) 15 C.2d 721, at p. 727. It cannot be reasonably concluded that Respondent acted dishonestly with regard to the deposit of the Lerner payment of $91,000, and its immediate withdrawal

in the presence of Lerner. The commingling complained of is neither an act of moral turpitude nor is it commingling, either in substance or technically, in these circumstances.

IV

THE BAD MOTIVES OF THE COMPLAINANTS SHOULD BE CONSIDERED.

In the case at hand, the clear malice, bad motives and spite of the Lerners should be taken into account. Surely the credibility of the complainants must be questioned and "evidence which bears the ear marks of private spite should be scrutinized (here) most carefully and accepted with extreme caution". *Herrscher v. State Bar* (1935) 4 C.2d at p. 834, 114 P.2d 832. Where, as here, the complaint and the evidence is colored either by self-interest or animosity, it should be scrutinized carefully. *Hildebrand v. State Bar* (1941) 18 C.2d 816, at p. 834, 114 P.2d 860.

Where the Panel was called upon to resolve conflicting proof, the private spite, animosity and self-interest of the complainant must weight in favor of rejecting complainant's proof. *Hildebrand, supra,* at page 834.

Any reasonable doubts should be resolved in favor of Respondent. *Furman v. State Bar* (1938) 12 C.2d 212, at page 229, 83 P.2d 12; *Herrscher, supra;* and *Hildebrand, supra.*

V

THE EXAMINER FAILED TO MEET THE BURDEN OF PROOF. THE DEPARTMENT RECOMMENDATION MUST BE DENIED.

These proceedings involving the resolution of "counts" are "quasi-criminal." Respondent has a distinguished lifetime career. The cases have created the substantial equivalent to the statutory protection of proof beyond a reasonable doubt in requiring "clear and convincing evidence" that Respondent intended, for example, to willfully convert or to commit an act of moral turpitude. *Golden v. State* (1931) 213 C. 237, at page 247; *Furman, supra; Herrscher, supra.* Any reasonable doubts must be resolved in Respondent's favor. *Golden, supra; Shelly v. State Bar* (1973) 9 C.3d 502, 509, 511, 108 C.R. 6.

While the proceedings at hand are properly designed to protect the public and the profession from objectionable activities of persons who are unfit to practice law, *the record utterly fails to present clear and convincing proof that Respondent either committed or intended to commit an act of moral turpitude or any other act making him unfit to practice law.* Again, moral fitness is the basic issue and moral unfitness has not been established by clear and convincing proof.

The Panel received Respondent's resume. (Appendix D.) In 1980 when Respondent was laboring with the tasks of making these projects succeed, Respondents had an "av" rating in Martindale Hubbell having experienced 21 years of successful trial practice, (at that time,) without blemish or suggestion of wrongdoing or unethical conduct and certainly no prior discipline.

Today, there is indeed a question in Respondent's mind as to whether it was appropriate for any reason to enter

into the Lerner Agreement thereby taking the transaction out of the applicable usury laws. But that bad judgment does not constitute dishonesty or immorality or moral turpitude. Stupidity, perhaps, but not willful dishonesty.

Arguably, that judgment could be fairly criticized if Respondent sought at any time to avoid his obligations under that agreement alleging usury as a basis for avoidance. But there was no such sharp practice here. To the contrary, Respondent at every stage attempted only to perform and complete what he perceived his obligations to be and produce a profit, repay the loans and the negotiated "to boot".

Respondent hereby again declares his remorse and not only acknowledges once again that it was wrong to sign the Lerner agreement, but, it is also clear that the consequences of signing that agreement have been such as to assure that it will never happen again. And, Respondent so unequivocally represents to this Honorable Court.

The cases cited to the Panel urging discipline for violation of fiduciary duty relate to partnerships between attorney and client. That was true before the Department, as well. In each case, there was clear and convincing evidence of partnership and an attorney-client relationship; and, the attorney's acts *sub-rosa,* were accomplished privately and with stealth. There was no claim of "no partnership." The fiduciary duty was clearly present because of the relationship. In the case at hand, everything Respondent did beginning with the $91,000 first paid by Lerner, all, was done out in the open and with full knowledge and disclosure.

Furthermore, it is suggested there was aggravating circumstances here, lack of repentance, lack of insight into the gravity of the offense charged, lack of remorse or

insistence upon innocence in the face of allegedly overwhelming evidence of culpability. There is absolutely no basis in the record at hand to conclude Respondent is guilty of any or either of these "aggravating circumstances," let alone conclude that Respondent so acted. The Examiner relies on Taylor's testimony and concludes Respondent acted "irrespective of the wishes of his joint venturers", meaning Taylor. But, the transcript also reveals *Taylor, the contractor knew better than anyone what monies were needed and were borrowed through what were initially and continue to be his banking contacts.* Taylor was not a joint venturer or partner, at all. That was conclusively established after a full trial on the merits (Exhibit "K"), but ignored in these proceedings below.

VI

THE EXAMINER INCORRECTLY CHARACTERIZED IMPORTANT FACTS AND MISSTATED THE EVIDENCE.

The Examiner argued successfully that the amount of encumbrances directly affected the ability of Lerner to realize anything on their investments or to even get their money back. "The greater amount of paper secured by the property, the less the return to Taylor and Lerner upon sale of that property." (Examiner's Brief, p. 15.) In fact, Eagle Pass was appraised at $3.5 million, in escrow at $3.4 million and had only $1.2 million against it. That is a loan to value ratio of about 30%. Hardly excessive. Bonsall had $450,000 against it with a value of about $750,000 or a loan to value ratio of 60%. The elementary and simplistic argument made to the Review Department by the Examiner is unsupported and should not have been persuasive.

Furthermore, both the Lerner agreement and the Taylor agreement charged Galardi, only, with the cost of financing, interest, etc. In addition, neither property could be built on the basis of limited borrowings secured by each property individually and the combined values of Respondent's properties was needed in order to secure construction funds adequate to complete the construction that was planned. In this regard, the Lerner and Taylor agreements are indentical. The properties were Respondent's, Respondent was charged with the costs of the borrowings because the funds borrowed were Respondent's funds. The net profit to both Lerner and Taylor was on the basis of the costs of construction and those costs could only be covered through the combined equity loan, the cross-collateralization, that had been agreed to and was in progress when Lerner stopped it.

The Examiner argued "where an attorney assumes a fiduciary relationship, and violates his duty in a manner that would justify disciplinary action if the relationship had been that of an attorney and client, he may properly be disciplined for his misconduct." (Examiner's Brief, p. 18.) The Department agreed but that is error on these facts.

The Examiner argued "an attorney who took partnership money for his personal purposes and commingled partnership funds with his own funds was disbarred". (Examiner's Brief, p.18.) Respondent did not commingle or "take partnership money" from Lerner. There was no partnership and the distribution of loan funds was in the open and with knowledge to all parties. There was no commingling of "partnership" funds and there was no commingling of attorney-client funds.

The Examiner urged Respondent is guilty of "lack of candor". *The Review Department erroneously adopted that*

in the face of an overwhelming record of cooperation. In fact, Respondent voluntarily and willingly gave far more evidence than was required or necessary, in these proceedings. Had Respondent had the good fortune to be represented by counsel, there is no doubt the Panel would have had to deal with objections as to relevance regarding the Examiner's proof, in view of the allegations set forth in the Notice. Conversely, Respondent produced full and complete information both in documentary form and in Respondent's testimony. Respondent's demeanor and the Panel's opportunity to compare the demeanor and the testimonial responses of the Lerners, Respondent submits, lead the Panel to conclude Respondent did not "lack candor". That is why the panel recommended Respondent be privately reproved.

The Examiner asserted Respondent "refused" to testify under oath that Taylor suggested the Taylor agreement was a "joint venture". *Respondent did not refuse to testify to anything.* Respondent, unfortunately was required to appear *in pro per* and the testimony Respondent gave was without the assistance of questioning by counsel. To say that Respondent "refused" to give evidence when he testified extemporaneously at such great length is manifestly unfair and an inappropriate characterization.

The Examiner asserted Mrs. Galardi "refused to support Galardi's contention that is was she that typed Exhibit 4". (Examiner's Brief, P. 20.) In fact, Mrs. Galardi testified she typed the Lerner Agreement, she was there and she did it. She also testified she had no present recollection of using the large paper. That does not constitute a denial that she typed Exhibit 4. Rather, it evidences in these circumstances her unwillingness to be fooled or tricked by Mr. Appleton who was presumably questioning, on the sixth day of these proceedings, the

signatures on the document that had already been identified by the parties to the document. In any case, the lack of present recollection with regard to the use of longer paper does not abrogate her testimony that she typed and prepared Exhibit 4 and was there when it was changed and when it was signed by Respondent. It is uncontroverted that Richard Lerner prepared the handwritten draft.

The Lerners were aware of the combined equity loan that was in progress as early as February 1980. The Lerners agreed to each loan, at every stage including the $250,000 loan that was discussed with the Lerners on June 19, 1980. That conclusion is inescapable. A reasonable evaluation of work in progress reveals that. It is true there was controversy at the June 19 meeting and subsequently lawsuits were filed in late June that were exhibited in DeVore's office in July of 1980 when the Lerner demands were made. The civil litigation was filed and was used as a threat for negotiating a deeded interest for Taylor and Lerner, or, immediate cash.

The Examiner referred to Exhibit 8 and stated Respondent changed his testimony with regard to that deed. (Examiner's Brief, p. 20.) In fact, Respondent testified with regard to Exhibit 8 believing the description, without reference to any other material, pertained to Bonsall. Later in the proceeding that day it became apparent that the legal description was in fact *not* the Bonsall description. There has been transfers of other of Respondent's properties to the law corporation for tax purposes. The confusion was only momentary and only with regard to the legal description attached to that particular deed. Over-zealous counsel was unable to cite any other purported inconsistencies. Respondent has testified in five different trials but the Examiner was unable to find

inconsistent testimony to impeach or even attempt to impeach Respondent. If Respondent's facts were contrived or a fabric of lies, that would have become apparent before this, in the thousands of pages of trial testimony that preceded this review.

The Examiner cited Rule 8-101 regarding "client trust funds" as a grounds for discipline under this Notice to Show Cause. (Examiner's Brief p. 20). There was no allegation of abuse of "client trust funds", no proof of any intent to abuse or misuse client Trust Funds and there was no showing of attorney-client relation at any stage. *Those false issues obfuscated and confused and resulted in prejudicing the Review Department.* The only evidence with regard to the professional corporation trust account, was the evidence with regard to the deposit and contemporaneous withdrawal of the $91,000, in Lerner's presence and with his uncontroverted acquiescence. Lerner "created" that false issue when he had his brother draw the check to the professional corporation trust account. The Bar saw through that in evaluating the complaint and preparing its Notice to Show Cause, but, the Examiner chose to revive it in order to prejudice Respondent. He had no other legitimate purpose. It certainly was not factual.

In sum, Respondent neither vacillated nor was he evasive. There has been no lack of candor, at any stage. The Department's finding is clearly erroneous resulting from unfounded prejudice. There has been voluntary and willing production of documents and complete consistency throughout these circumstances beginning in 1980, through the present Petition for Writ of Review. It is important to note this complete consistency takes on special significance in view of the complex factual circumstances, the period of time over which Respondent has

endured the Lerner attacks, all compounded by the need for Respondent to appear *in pro per* because of the personal bankruptcy and the loss of all of Respondent's personal assets and those of his spouse.

VII

ASSUMING ARGUENDO THE PARTIES WERE "PARTNERS" THERE ARE MITIGATING CIRCUMSTANCES THAT WERE NOT CONSIDERED BY THE REVIEW DEPARTMENT

The Supreme Court must consider all events, both favorable and unfavorable, in reviewing the disciplinary action recommended by the Review Department. *Yokozeki v. State Bar,* (1974) 11 C. 3d 436, 450, 451, 113 C.R. 602; *Toll v. State Bar,* (1974) 12 C. 3d 824, 832, 117 C.R. 427; *In re Kreamer* (1975) 14 C.R. 427; 121 C.R. 600; *Segretti v. State Bar* (1976) 15 C. 3d 878, 888, 12 C.R. 793; *In re Dedman* (1976) 17 C. 3d 229, 234, 130 C.R. 504; *Price v. State Bar* (1982) 30 C. 3d 537, 179 C.R. 914.

The Review Department recommendations reveal there was no consideration given to Respondent's exemplary record of service to clients, Respondent's good motives and the attempt to complete his obligations.

VIII

THERE WAS NO INTENT TO DECEIVE OR WILLFUL MISAPPROPRIATION. RESPONDENT PERFORMED AS ALL PARTIES AGREED HE WAS TO PERFORM

There was no willful misappropriation here. The finding that Respondent "refused and still refuses to account" is not in accord with the evidence and it is clearly, in error.

Respondent's well-intentioned effort to use his properties as agreed in order to cross-collateralize and thereby borrow sufficient funds to complete the projects was motivated by the desire to make the projects successful. There was no personal enrichment. The monies went into the properties and to provide only the most limited sustaining expense income during Respondent's involvement in the construction instead of his law practice. That was understood, agreed to and fully within the expectation of the parties. Neither of the single properties had sufficient value before improvement to justify the borrowings necessary to complete the planned improvement of each property. That is why the Respondent's creditworthiness and cross-collateralization of Respondent's properties was agreed to.

While "good motives" are usually never a complete defense (*Pickering v. State Bar* (1944) 24 C. 2d 141, 145), they are important in mitigation of the penalty. *Ames v. State Bar* (1973) 8 C. 3d 910, 921, 106 C.R. 489. See, also, 7 Am.Jur. 2d, Attorneys at Law, sections 52 and 59.

A full and complete record of the borrowings and the disbursement of funds at the time each loan was funded, was produced, received and testified to cooperatively and without any evasion or contrivances, whatsoever, by Respondent. All loans were discussed prior to the funding with the complainants. The Lerners testimony was contrived by attorney Richard Lerner in order to carry out his own personal motives of spite and malice.

While the bad motives of the complainants are or may be immaterial if there are independent facts that support intentional unlawful or unethical conduct, here, it is fair and reasonable to conclude that bad motives of the complainants have a clear and unmistakable relevance to the credibility of the Lerners and Taylor. Clearly, evidence of

private spite and malice must be scrutinized carefully. *Herrscher v. State Bar, supra; Hildebrand v. State Bar, supra; McGrath v. State Bar,* (1943) 21 C. 2d 737, 741, 135 P.2d 1.

The Review Department had no opportunity to observe and weigh the credibility of the Lerners. It is reasonable to conclude the recommendation of the Panel was strongly influenced by the issues of credibility. Assuming the Panel believed the "label" on the agreement drafted by Lerner weighed more heavily in favor of finding a partnership than the extrinsic evidence of a usurious loan and the performance of the parties, modifying and changing the agreement, then the serious lack of credibility of the complainants testimony in many significant particulars, reasonably explains the Panel's recommendation of only private reprimand. Perhaps the unstated rationale was that it was wrong to sign the agreement as drafted and changed by Lerner. In any case, the Panel and not the Department, observed the complaintants.

The Review Department heard the matter for less than ten minutes and relied upon an oral presentation of a freshman lawyer and a law student. That is not intended as *ad hominem* and should not, Respondent respectfully submits, be so regarded. It is, however, significant in explaining and understanding the unconscionable result erroneously sought and reached below.

The transaction complained of by Lerner was participated in fully by another attorney, the complainants' brother, Richard lerner. He represented the complainant (Bernie) and was also attorney for Taylor. He wrote the agreement, devised its onerous and false terms that described an attorney-client relationship between Respondent and complainant, and was as much a participant as Respondent in each of the events relied upon by the

Review Department. Attorney Lerner contrived the complaint just as he did the "attorney-client" relationship, the decision to transfer only $91,000, the percentages of compensation, his undisclosed (undisclosed to his client-brother) "finders fee", the later real estate commission, to repeat a few. The Panel no doubt concluded it was stupid of Respondent to go through with the deal and it was stupid not to continually document the on-going dealings with the Lerners. But, stupidity is not malfeasance or moral turpitude or intentional and willful taking of property. And, the record supports the clear and unmistakable effort and intention of Respondent to make the project a success. Nothing else would have been reasonable. The record only supports the reasonable conclusion that the projects failed when attorney Richard Lerner "pulled the rug out", and successfully obtained a writ of attachment claiming partnership and a vested interest in property that was owned by Respondent and Shari Galardi, who was not a party. Those attachments and lis pendens were wrongful as to Respondent and as to Shari Galardi, but, they effectively stopped the pending refinance and that is why the project failed. The clear and unrefutable reason for what Lerner did lies in the fact that Respondent refused to be blackmailed and coerced into giving one-half of the properties to Lerners' clients and sharing the refinance proceeds with them. At the time, the suggestion that Richard lerner could succeed in what he threatened, was laughable.

But that stupidity does not, and did not then, constitute an intention to misappropriate or commit an act of moral turpitude either by Respondent alone or by virtue of agreeing with attorney Lerner to shield the usurious loan. *Herrscher v. State Bar, supra, Gray v. State Bar,* (1934) 2 C 2d 226, 33 P.2d 1016.

IX

THE GOOD CONDUCT AND OUTSTANDING RECORD ACHIEVED IN TWENTY-SEVEN YEARS OF PRACTICE IS MATERIAL AND SIGNIFICANT: (a) IN WEIGHING CREDIBILITY; AND (b) CONSIDERING DISCIPLINE

The record clearly demonstrates Respondent's candor, cooperation and complete and utter truthfulness on every issue. *Honoroff v. State Bar* (1958) 50 C. 2d 202, 210, 323 P.2d; *Dermain v. State Bar* (1970) 3 C. 3d 381, 388, 90 C.R. 420; *Signer v. State Bar,* (1934) 21 C.2d 688, 690, 134 p.2d 757; *Crawford v. State Bar* (1960) 54 C. 2d 659, 669, 7 C.R. 746; *In re Jones* 91971) 5 C. 3d 390, 400, 96 D.R. 448, 487; *In re Higbie* (1972) 6 C. 3d 562, 573, 99 C.R. 865; *In re Fahey* (1973) 8 C.3d 842, 848; *Ames v. State Bar* (1973) 8 C. 3d 910, 921, 106 C.R. 489; *Segretti, supra; Price, supra; Barbie v. State Bar* (1931) 213 C. 296, 300; *Gray, supra.*

X

SHOULD THE COURT CONCLUDE SOME VIOLATION OCCURRED JUSTIFYING DISCIPLINE, RESPONDENT SUBMITS THERE IS: (a) A FAIR AND REASONABLE BASIS UPON WHICH TO CONCLUDE THE RECOMMENDATION OF THE PANEL IS SUFFICIENT IN THESE CIRCUMSTANCES; AND, (b) RESPONDENT HAS ENDURED SIX YEARS OF PROFESSIONAL AND SOCIAL OSTRACISM AS A RESULT OF THE FAILURE OF THE MALIBU PROJECTS TOGETHER WITH THE UTTERLY COMPLETE AND DEVASTATING ECONOMIC CONSEQUENCES OF THE REORGANIZATION AND THEN THE ORDER SOUGHT BY LERNER AND TAYLOR CONVERTING THE CHAPTER 11 TO A CHAPTER 7 LIQUIDATION

The Panel recommended that Respondent be privately reproved.

Subsequent to the initial problems engendered by the suits filed by Lerner and Taylor in 1980, Respondent undertook continuing efforts to save the projects and return to a full time civil trial practice.

The procedures for discipline, although adjudged not to be punishment and rather to be a method devised to insure protection to the public, carries with it professional and social ostracism. This is no less real than the stigma normally associated with bankruptcy. In the wake of the events that are the subject of this review, the record reveals Respondent has continued to earn the respect of members of the Bench and the bar, has involved himself in public service and has undertaken to favorably acquit

himself in serving to advantage both clients and his family. (Please see, Appendix D.)

While the ability to earn has been seriously impaired by these events, the ability to serve has not. Accordingly, Respondent respectfully submits the Court, upon review, if it determines there has been a violation, should impose the discipline of private reproval, and, allow Respondent to get on with the business of life.

This principal was eloquently stated in the seasoned case of *In re Andreani* (1939) 14 C. 2d 736, 97 P.2d 456. There, in returning an attorney to a useful and productive life, the Court said:

> "The 'door of hope' should be no more conclusively or finally shut as to them then it should be thus closed as against any other person who has erred and consequently may have suffered a somewhat similar penalty through the disciplinary functioning of the law . . . Although it has been declared that disbarment is not adjudged as a punishment, but is a method judicially devised to insure protection to the public, — it is clear that when reformation of a disbarred member has been effected the public is no longer in need of such protection." 14 C. 2d, at page 749). See, also, *Werner v. State Bar* (1954) 42 C.2d 187, 265 P.2d 912; *Allen v. State Bar* (1962) 58 C. 2d 912 26 C.R. 771.

Respondent respectfully urges the Court to conclude no further protection to the public, is needed or warranted at this time and in these circumstances.

CONCLUSION

For the reasons stated for denial in the response to the Notice to Show Cause, the reasons herein stated and on the basis of the evidence and proceedings heretofore had herein, Respondent respectfully requests this Honorable Court deny and refuse the recommendations of the Review Department as they are not supported by substantial evidence and are based on findings that are clearly erroneous and conclusions that are in error, as a matter of law.

DATED: May 1, 1986

Respectfully submitted,

Lawrence J. Galardi
Respondent
In Pro Per
A Member of the State Bar

VERIFICATION OF PETITION

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES.

I have read the foregoing PETITION AND BRIEF and know its contents.

I am a party to this action. The matters stated in it are true of my own knowledge except as to those matters which are stated on information and belief, and as to those matters I believe them to be true.

Executed on May 1, 1986, at Los Angeles, California.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

s/
Lawrence J. Galardi

APPENDIX J

IN THE SUPREME COURT
OF THE
STATE OF CALIFORNIA

PETITION FOR REHEARING
L.A. 32184

LAWRENCE J. GALARDI,
Petitioner,

VS.

THE STATE BAR OF CALIFORNIA,
Respondent.

LAWRENCE J. GALARDI
904 Silver Spur
Rolling Hills, California 90274
(213) 541-0749

IN THE SUPREME COURT
OF THE
STATE OF CALIFORNIA

PETITION FOR REHEARING
L.A. 32184

LAWRENCE J. GALARDI,
Petitioner,

VS.

THE STATE BAR OF CALIFORNIA,
Respondent.

TO: THE HONORABLE CHIEF JUSTICE AND TO THE HONORABLE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE STATE OF CALIFORNIA:

Petitioner Lawrence J. Galardi, a member of the State Bar, respectfully petitions for rehearing following this Court's decision filed August 3, 1987.

QUESTIONS PRESENTED

1. Is the Supremacy Clause of the United States Constitution, Article 6, a jurisdictional bar to the relitigation of the Taylor debt?

2. Do the prior consistent adjudications of the Taylor transaction constitute a bar to re-litigation of the same issues for reasons of res judicata and collateral estoppel?

3. Will evaluation and construction of the writings as of the time and circumstance the writings were made, require the conclusion that none of the parties that were involved, intended a partnership or joint venture, at anytime?

TOPICAL INDEX

	Page
PETITION FOR REHEARING	i
QUESTIONS PRESENTED	ii
TOPICAL INDEX	iii
TABLE OF AUTHORITIES CITED	vi
STATEMENT	1
I	
THE SUPREMACY CLAUSE IS A JURISDICTIONAL BAR TO RE-LITIGATION OF THE TAYLOR DEBT	2
II	
RES JUDICATA IS A BAR TO RE-LITIGATING THE TAYLOR TRANSACTION	7
III	
COLLATERAL ESTOPPEL APPLIES AS A PRECLUSIVE RULE	9
IV	
CONSTRUCTION OF THE WRITINGS AS OF THE TIME THE WRITINGS WERE MADE REQUIRES THE CONCLUSION THAT NO PARTNERSHIP OF ANY KIND WAS INTENDED BY THE PARTIES OR CREATED THEREBY	11
ARGUMENT	12
A. Complainants would not have interfered with the refinance, if they were partners	12
B. The "partnerships" would have been placed in Chapter 11	12
C. The Federal Court would not have dismissed the "partnership" involuntary bankruptcies	12
D. The complainants claimed "partnership" only when it suited their purposeful greed	13
E. There were full accountings of all monies in and out	14

Page

F. Both writings and all references to them were consistently made by the parties in order to disguise the loans for the benefit of the complainants 15

G. Both the Panel, the Review Department and this Honorable Court concluded there was no attorney-client relationship as between Petitioner and either of the parties 15

H. No promise of fiduciary duty was intended and none was included in the *Taylor* Agreement 16

CONCLUSION 16

TABLE OF AUTHORITIES CITED

CASES

	Page
Alberton v. State Bar, (1984) 37 Cal.3d 1	13
Allen v. McCurry (1980) 449 U.S. 90, 66 L.Ed.2d 308, 101 S.Ct. 411	9
C. I. Engineers & Constructors, Inc. v. Johnson & Turner Painting Co. (1983) 140 Cal.App. 3d 1011, 189 Cal. Rptr. 824	11
Cromwell v. County of Sacramento (1877) 94 U.S. 351, 24 L.Ed. 195	9
Dowell v. Applegate (1894) 152 U.S. 237, 38 L.Ed. 463, 14 S.Ct. 611	8
Hart Steel Co. v. Railroad Supply Co. (1917) 244 U.S. 294, 61 L.Ed. 1148, 37 S.Ct. 506	8
Hoag v. New Jersey (1958) 356 U.S. 464, 2 L.Ed. 2d 913, 78 S.Ct. 829, reh den 357 U.S. 933, 2 L.Ed.2d 1375, 78 S.Ct. 1366	10
Illinois v. Milwaukee (1972) 406 U.S. 91	5
Lawler v. National Screen Service Corp. (1955) 349 U.S. 322, 99 L.Ed. 1122, 75 S.Ct. 865	9
Local Loan Co. v. Hunt (1934) 292 U.S. 234	4
Paine & Williams Co. v. Baldwin Rubber Co. (1940, CA 6) 113 F.2d 840	9
Palmer v. Radio Corporation of America (1971) 453 F.2d 1133, 1140-1141	4
Partmar Corp. v. Paramount Pictures Theaters Corp. (1954) 347 U.S. 89, 98 L.Ed. 532, 74 S.Ct. 414, reh den 347 U.S. 931, 98 L.Ed. 1083, 74 S.Ct. 527	5, 6, 8, 9
Southern Pacific Rail Co. v. United States (1897) 168 U.S. 1	10
The Evergreens v. The Nunan (1944, CA 2) 141 F.2d 927, Cert. Den. 323 U.S. 720, 89 L.Ed. 579, 65 S.Ct. 49	10

Page

United States Trust Co. v. New Jersey (1976) 431 U.S. 1 52 L.Ed.2d, 108, 97 S.Ct. 1505 11

Zdanok v. Glidden Co. (1964, CA 2) 327 F.2d 944 6

UNITED STATES CONSTITUTION

Article 1, Section 8 Clause 4, The Bankruptcy Powers 3

Bankruptcy Powers 6

Supremacy Clause of the United States Constitution. U.S. Constitution Article 6 (1787) 1, 2, 3, 5, 7, 12

U.S. Constitution, Article 4, Section 1.....

United States Constitution, Article 6.....

STATUTES

11 U.S.C., Section 524 (1984) 3

11 U.S.C., Section 524 (a)(2) (1984) 3

11 U.S.C., Section 524 et. seq. (1984) 6

RULES OF COURT

California Rules of Court 27(a) 1

OTHER AUTHORITIES

House Report No. 95-595, pages 177-178, 186 (5 U.S. Code Congressional and Administrative News (1978, 95th Congress, Second Session) pages 6138-6139, 6147) 4

Senate Report No. 95-989, pages 6-7, 98 (5 U.S. Code Congressional and Administrative News (1978, 95th Congress, Second Session) pages 5792-5793, 5884) 4

Vestal, "The Constitution and Preclusion/Res Judicata, 62 Michigan Law Review 33 (1963) 10

STATEMENT

This Honorable Court entered its decision, *per curiam* on August 3, 1987.

Petitioner seeks Rehearing and Reconsideration in order to obtain clarification of limited issues pursuant to California Rules of Court 27(a).

Petitioner asks only that the Court reconsider whether these debts were the result of loans rather than partnership investments and whether the prior decisions in the Federal Court constitute a bar to re-litigating issues already fully adjudicated on the merits, either because of a jurisdictional impediment or because of their res judicata and collateral estoppel effect. Specifically, the Court is asked to determine whether:

a. Taylor had any legal or equitable interest in Galardi properties or in monies borrowed by Galardi, secured by those properties;

b. The Lerner/Galardi "Joint Venture Agreement" should be given any weight, in any respect, in determining the relationships of the parties, in these circumstances.

I

THE SUPREMACY CLAUSE IS A JURISDICTIONAL BAR TO RE-LITIGATION OF THE TAYLOR DEBT.

This Petition for Rehearing is respectfully submitted in order to seek and permit clarification of limited issues and in order to suggest reconsideration of the Taylor claim in the following respects.

A. Clarify the record with regard to whether Petitioner waived the jurisdictional impediment presented by

the Supremacy Clause, United States Constitution, Article 6, to re-litigation of the Taylor debt, in this Court.

Petitioner submits re-litigation of the Taylor transaction by the State Bar is barred by the Supremacy Clause of the United States Constitution. U.S. Constitution Article 6 (1787). The Taylor transaction, including all claims and allegations made by Taylor in the Superior Court action which was transferred to the Federal Court, tried on the merits there and decided in December 1983, resulted in a final judgment discharging Petitioner's debt to Mr. Taylor in bankruptcy. The Panel had before it Exhibit K, (Appendix E to Petitioner's Brief). The issues of prior adjudication of the Taylor transaction in the Federal Court were perfected before the Panel and briefed to the Review Department, as well.

The brief of Amicus directed this Court's attention to the Supremacy Clause.

At the oral argument on May 8, 1987 Michael Moorehead, Esq. who represented Petitioner, deferred argument on behalf of Petitioner embracing the argument of Amicus. Parenthetically, Petitioner submits, this Court's reference in Footnote 3 of its decision, if it results in Petitioner's suffering the loss of the protection of the Supremacy Clause, would in effect, elevate form over substance, i.e. requiring some additional articulation of the constitutional protection other than what was placed before the Panel and the Review Department and before this Court by Amicus.

In any case, Petitioner submits the Supremacy Clause presents a jurisdictional bar to forceable reinstatement and that becomes particularly clear when Article 6 of the Constitution is read with Article 1, Section 8 Clause 4,

The Bankruptcy Powers and the provisions of 11 U.S.C., Section 524 (1984).

It would appear the State Bar is subject to 11 U.S.C., Section 524 (a)(2) (1984) which provides, in part: "A discharge under this title — (2) operates as an injunction against . . . an act, to collect, recover or offset any such debt as a personal liability of the debtor, whether or not discharge of such debt is waived." It would appear also that pursuant to the provisions of 11 U.S.C., Section 524 (c) and (d) (1984) reaffirmation of discharged debts is strictly limited to agreements made prior to discharge and approved by the United States Bankruptcy Court. Because the Bankruptcy Code is specifically designed to give the debtor a "fresh start", 11 U.S.C., Section 524 (1984) provides, in part:

> "(A) Governmental unit may not deny, revoke, suspend, or refuse to renew a license . . . or other similar grant to, condition such a grant to, discriminate with respect to such a grant against, deny employment to, terminate the employment of, or discriminate with respect to employment against, a person that is or has been a debtor under this title . . . solely because such . . . debtor . . . has not paid a debt that is dischargeable in the case under this title . . ."

See also, Senate Report No. 95-989, pages 6-7, 98 (5 U.S. Code Congressional and Administrative News (1978, 95th Congress, Second Session) pages 5792-5793, 5884); *Local Loan Co. v. Hunt* (1934) 292 U.S. 234, 244.

Another important purpose of the Code is the equitable distribution of the debtor's assets among creditors. House Report No. 95-595, pages 177-178, 186 (5 U.S. Code Congressional and Administrative News (1978, 95th

Congress, Second Session) pages 6138-6139, 6147); *Palmer v. Radio Corporation of America* (1971) 453 F.2d 1133, 1140-1141. By reaching a result different than that reached in the Bankruptcy Court, Taylor is being granted preferential treatment, preferential over the relief accorded other creditors in those proceedings. Considering the Federal Court's disposition of the Taylor claim (i.e., Taylor had no legal or equitable interest in the Petitioner's properties that comprised the estate or borrowed funds secured by those properties), relitigating those issues and reaching a different result affords Taylor creditor's rights heretofore denied Taylor and other creditors in the Bankruptcy Court.

While the restitution of the Taylor funds might in a proper case be characterized as restoring damages resulting from either a tortious or contractional breach, to thus conclude is precluded here as those matters have been conclusively litigated on the merits. The Federal Court found and concluded those on the merits. The Federal Court found and concluded those allegations and claims were not supported by the facts or the law. A different result here is therefore violative of the fresh start policy, generally, and the equitable distribution of assets, without preference. Equally important is the fact that relitigation of the prior adjudication conflicts with the Supremacy Clause and the principles of res judicata, as hereinabove urged.

Finally, while a discharge will not insulate a debtor from the consequences of pre-petition behavior, that is not the issue here since the Federal Court ruled the pre-petition transaction with Taylor did not constitute the partnership relationship alleged by Taylor and it did not substantiate the claims of legal or equitable interests in

the Petitioner's property or loans made to Petitioner, secured by his properties.

B. The Court is urged to reconsider the applicability of the Supremacy Clause, for three reasons:

1. Because the Federal Court decided there was no "Taylor/Galardi partnership."[1]

2. Because there were no conflicting interpretations in the two prior Federal Court adjudications regarding the Taylor transaction and the Taylor/Galardi relationship;[2]

Where the prior judgment is a Federal judgment, as *Theaters Corp.* (1954) 347 U.S. 89, 98 L. Ed. 532, 74 S. Ct. 414, reh den 347 U.S. 931, L. Ed. 1083, 74 S. Ct. 527, or its collateral estoppel effect, *Zdanok v. Glidden Co.* (1964, CA 2) 327 F.2d 944, is governed by Federal law. That is especially true where a federal question, (here, the Bankruptcy Powers) is involved. *Partmar Corp. v. Paramount Pictures Theaters Corp. supra.*

It would also appear that Federal law governs where there is an overriding federal interest in a uniform rule of decision, *Illinois v. Milwaukee* (1972) 406 U.S. 91, 31 L. Ed. 2d 712, 92 S. Ct. 1385, (discharge of debts adjudicated after adversary proceeding, for example), or where the matters in issue are preempted by a body of federal law as in the provisions of the Bankruptcy Code and particularly 11 U.S.C., Section 524 et. seq. (1984).

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[1]Appendix E to the Petition for Review, paragraphs 5 through 9 of the Conclusions of Law. The decision referred to was marked as Exhibit K before the Hearing Panel. That adjudication was made after issue had been joined and was urged as a bar to re-litigating the Taylor debt, before the Panel.

[2]Decision II, A, contra.

3. Because the $120,000 loan[3] by Tokai Bank used to pay off a loan encumbering the 29 acres on Big Rock Drive, was secured by that 29 acres which (a) belonged to Petitioner and his wife and (b) was not "joint venture property" as the Court's analysis uses that characterization.

Taylor v. Galardi adjudicated Taylor's claimed legal and equitable rights in both the 29 and the Eagle Pass property and the Federal Court ruled he had no such rights. Those allegations were made in the Lerner inspired complaint filed by Lerner on behalf of Taylor in the Superior Court, initially, and removed to the Federal Court. The re-finance came to an abrupt halt as a result of that Superior Court filing claiming "partnership" interests in those two properties and the Bankruptcy ensued seven months later, as a result. It is difficult to imagine "partners" in a business transaction thus foreclosing all possibility of success of the business, unless they were not partners and acted out of malice, only.

II

RES JUDICATA IS A BAR TO RE-LITIGATING THE TAYLOR TRANSACTION.

Apart from Supremacy Clause considerations, Taylor was a party to both bankruptcy proceedings and this Court's decision addresses matters already litigated and adjudicated on the merits as between Taylor and Galardi.[4]

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[3]Decision II, B, 1.

[4]*Taylor v. Galardi*, Consolidated Adversary Proceeding No. LA 81-0653 and 81-5220, Appendix E to the Petition; and, in re Taylor and Galardi, a general partnership, etc. LA 82-20724.

The fact that the State Bar was not a party in the Federal Court should not be persuasive as the State Bar stands in Taylor's shoes on the limited issues of the Taylor/Galardi business transaction, *i.e.,* since there was no attorney-client relationship. It is fair and reasonable to conclude that when Taylor, or anyone, seeks to use a complaint to the State Bar as an alternate means of resolving a business dispute, a civil claim, as it were, that party should be bound by ordinary rules of law, both substantive and procedural, including principals of res judicata. Accordingly, the State Bar should not be permitted to collaterally attack the earlier consistent adjudications as to that business relationship because of their res judicata affect. Petitioner submits, res judicata is not a mere matter of practice or procedure inherited from a more technical time. A matter once litigated cannot be brought again into litigation between the parties to the controversy upon any ground whatsoever. *Dowell v. Applegate* (1894) 152 U.S. 237, 38 L. Ed. 463, 14 S. Ct. 611, ennunciates that timeless principle. The rule is one of fundamental and substantial justice. It is a rule of both public policy and private peace and it is a rule which should be enforced by this Court to the end that rights once established in a court of competent jurisdiction, here, the Federal Court, must be recognized by those, who are bound by that judgment in every respect. *Hart Steel Co. v. Railroad Supply Co.* (1917) 244 U.S. 294, 61 L. Ed. 1148, 37 S. Ct. 506.

III

COLLATERAL ESTOPPEL APPLIES AS A PRECLUSIVE RULE.

Re-litigation of the same issues vis-a-vis the Taylor-Galardi transaction in a different cause of action or in a

different forum is also precluded by rules of Collateral Estoppel. The doctrine is one of preclusive effect and therefore carries severe jurisdictional overtones. *Lawler v. National Screen Service Corp.* (1955) 349 U.S. 322, 99 L. Ed. 1122, 75 S. Ct. 865. The rule prevails where the parties have had a full and fair opportunity to litigate the basic issues that are essential to judgment. *Allen v. McCurry* (1980) 449 U.S. 90, 66 L. Ed.2d 308, 101 S. Ct. 411; *Partmar Corp. v. Paramount Pictures Theaters Corp. supra*; *Cromwell v. County of Sacramento* (1877) 94 U.S. 351, 24 L.Ed. 195. Exhibit K before the Panel (Appendix E to the Petition for Review) spells out Findings of Fact and Conclusions of Law fundamental to the determination of the entire Taylor transaction. All certain and material points arising out of the allegations and contentions of Taylor in the suit (first instituted in June 1980) in the Superior Court and thereafter transferred to the Federal Court for trial, were fully litigated. Therefore, that constitutes a bar to re-litigation in these proceedings. *Paine & Williams Co. v. Baldwin Rubber Co.* (1940, CA 6) 113 F.2d 840.

The commentators affirm that further litigation is foreclosed because res judicata and collateral estoppel are essentially doctrines of preclusion. Examination reveals the Taylor issues raised before the Panel, considered by the Review Department and ruled upon in this Court's decision are identical to the issues actually litigated and decided by the fact finder in the Federal Court. That adjudication was actually dependent on the determination of the identical central issues re-litigated here. Petitioner submits to thus proceed is barred by both res judicata and collateral estoppel principles. See, Vestal, "The Constitution and Preclusion/Res Judicata, 62 Michigan Law Review 33 (1963); *Partmar Corp. v. Paramount Pictures Theaters Corp., supra; Southern Pacific Rail Co. v. United*

States (1897) 168 U.S. 1. And, since the Federal Court decision concludes as a matter of law that Taylor had no legal or equitable interest in the Galardi properties or in the funds borrowed by Galardi, and concludes there was no misuse of funds and the debt was discharged, that judgment could not have been rendered without deciding those critical issues. *Hoag v. New Jersey* (1958) 356 U.S. 464, 2 L. Ed. 2d 913, 78 S. Ct. 829, reh den 357 U.S. 933, 2 L. Ed.2d 1375, 78 S. Ct. 1366.

Finally, a second look at the decision in *Taylor v. Galardi* persuasively demonstrates the decision settled as a matter of fact and as a matter of law all ultimate facts requiring decision between the parties. The decision did not involve only "mediate datum" and it should therefore be given full faith and credit. U.S. Constitution, Article 4, Section 1; *The Evergreens v. The Nunan* (1944, CA 2) 141 F.2d 927, Cert. Den. 323 U.S. 720, 89 L. Ed. 579, 65 S. Ct. 49.

Judge Learned Hand's rationale in *The Evergreens* case is applicable here. The Taylor transaction cannot be construed here as a joint venture or partnership in view of the Findings and Conclusions *Taylor v. Galardi.*

IV

CONSTRUCTION OF THE WRITINGS AS OF THE TIME THE WRITINGS WERE MADE REQUIRES THE CONCLUSION THAT NO PARTNERSHIP OF ANY KIND WAS INTENDED BY THE PARTIES OR CREATED THEREBY.

Construction of the agreements as of the time and circumstance of the writings requires the conclusion that none of the parties intended a partnership.

Petitioner submits it is necessary to construe both writings as of the time they were entered into.

That is true certainly as to the laws which subsist at the time and place of the making of the contract. *United States Trust Co. v. New Jersey* (1976) 431 U.S. 1, 19-20, 52 L. Ed.2d, 108, 97 S. Ct. 1505; *C. I. Engineers & Constructors, Inc. v. Johnson & Turner Painting Co.* (1983) 140 Cal.App. 3d 1011, 189 Cal. Rptr. 824. And, that must certainly be the rule of construction applied here in taking cognizance of the parties intentions, their respective positions and their objectives, at the time they made their agreement. Here, hindsight assessment of claims made under questionable circumstances after their deal went sour, cannot reasonably be substituted for a full and fair evaluation of what the parties expected both in profits, participation and performance. Neither Lerner nor Taylor were "buying" partnership risks, exposure or liabilities. Clearly, there was no limited partnership established. They wanted *then*, only to be lenders. That was the proof in *Taylor v. Galardi* and the result should not be different when they come back for a contrived second bite of the apple with complaints to the State Bar. The Court is asked to reconsider their motives, the inherent malice and the contrivances of attorney Richard Lerner.

ARGUMENT

If there was a partnership, Petitioner respectfully submits:

A. Complainants would not have interfered with the refinance.

The Lerners and Taylor would not have submarined, i.e., prevented Petitioner's refinance of Petitioner's properties and construction projects. It would have been

in their interest to permit the refinance so that their interest in the "joint venture projects" would not be lost. It is contrary to reason to conclude that they were partners rather than merely lenders who wanted to again "cut a better deal" for themselves, in view of their conduct.

B. The "partnerships" would have been placed in Chapter 11.

Petitioner would have filed bankruptcies on behalf of the "partnerships" instead of personal bankruptcies involving himself and his wife alone and his properties, only. It was not and would not have been to Petitioner's advantage to file personal bankruptcy if there were partnerships in existence.

C. The Federal Court would not have dismissed the "partnership" involuntary bankruptcies.

The unsecured creditors would have been successful in establishing those "partnerships" when they filed involuntary bankruptcy petitions as to the alleged Lerner/Galardi partnership and the alleged Taylor/Galardi partnership. In truth and in fact, the United States Bankruptcy Court determined there were no such partnerships. Since those matters were adjudicated earlier, further adjudication is barred as hereinabove urged by the Supremacy Clause, in these proceedings. Further adjudication is similarly barred for reasons of res judicata.

D. The complainants claimed "partnership" only when it suited their purposeful greed.

The rhetorical question, what would Lerner and Taylor have said in response to a claim against them as "partners" made on behalf of a youngster injured in a swimming pool, for example, is appropriate in analyzing what the circumstances were at the time the writings were

entered into. It is clear the partnerships alleged before the State Bar would have been disavowed. The "partnerships" were disavowed in the Bankruptcy Court. The Panel decided Bernie Lerner's sworn statement, however, that it was a loan and that he was not a partner, was a lie — and this Court so concluded.[5] But, the Panel and the State Bar were not free to simply disregard the Federal Court ruling of no partnership in *Taylor v. Galardi,* or disregard the dismissal of the involuntary bankruptcies both as to Taylor/Galardi and Lerner/Galardi.

The reasonable doubt thereby raised should have been resolved, Petitioner respectfully submits in favor of Petitioner. Alberton v. State Bar, (1984) 37 Cal.3d 1, 11.[6]

Furthermore, any presumption accorded the record made by the State Bar is overcome by reference to the prior adjudications of the same issues between the same parties in the Federal Court.

E. There were full accountings of all monies in and out.

The Court's conclusion that there was no accounting, inherently assumes an accounting was necessary at the time in June 1980. That a function of the conclusion

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[5]Decision II, A. The Court did not comment, however on the inescapable conclusion that the advocacy of counsel for Lerner and Taylor, at that time, in the Federal Court, were also lies.

[6]It has been suggested that the Panel's recommended discipline of private reproval was intended as an unarticulated resolution of: reasonable doubt; of controverted testimony; of the questionable integrity of Lerner and the complainants; of a perceived conflict with the result in *Taylor v. Galardi;* and, ultimately an attempt to balance the rights claimed and the remedies it concluded were reasonably available in a State Bar proceeding following the litigation in the Bankruptcy Court.

today, that there were "partnerships", in 1980. The Court inquired of State Bar counsel during oral argument with regard to an accounting. Thereafter its decision states only a single sheet of paper regarding some $68,000 in expenditures (as of June 1980) on the Bonsall Project had been submitted by Petitioner. In truth and in fact there are 12 separate accounting sheets reflecting all monies in and all monies out resulting from Galardi loans on the various Galardi properties, including Bonsall.

The loans to Mr. and Mrs. Galardi on the 29 acre property, the proceeds of which were used to pay off an earlier encumbrance they placed against the 29 acre property, was not included in that accounting. But, the 29 acres was not "joint venture property". Nonetheless, the decision erroneously relies upon that loan, however, as did the Review Department, as evidences of some wrongdoing.

F. Both writings and all references to them were consistently made by the parties in order to disguise the loans for the benefit of the complainants.

The Court finds there is no mention of "loans" in either of the writings. Petitioner asks the Court to recall that the language utilized by attorney Lerner in drafting the Lerner Agreement was intended by Lerner and consistent with Lerner's intention to disguise the loans so as to permit both Lerner and Taylor a return of more than 10% on the money loaned. The Court will also recall it is a matter of record that Lerner was attorney for Taylor when the October 1977 agreement with Taylor was negotiated. Furthermore, in the record before the Panel there was uncontroverted testimony by Taylor that the handwritten notes made on the agreement were made by Taylor *after* he had conferred with attorney Lerner regarding his (Taylor's) percentage of participation in the

profits and in order to increase his return on the money he was lending.

G. Both the Panel, the Review Department and this Honorable Court concluded there was no attorney-client relationship as between Petitioner and either of the parties.

The record before the Panel also reveals there were other portions of the Lerner writing that were disregarded by the parties.[7] Accordingly, Petitioner respectfully submits this Court, upon reconsideration should not merely adopt portions of the writings and reject other portions, as the portions rejected evidence the parties intention at the time to disguise the loan transaction for the benefit of the complainants.

H. No promise of fiduciary duty was intended and none was included in the *Taylor* Agreement.

The reference to a promised fiduciary duty to the Lerner complainants notably does not appear in the Taylor writing. It was included by Lerner when he drafted the Lerner agreement in the same way and for the same reasons that he included the language purporting to establish the attorney-client relationship. That attorney-client language has been clearly rejected by all who have considered it. The "promise of fiduciary duty" should not be given greater dignity or weight than the rejected attorney-client language.

CONCLUSION

This Court's conclusion that it was wrong to enter into the agreement with Lerner is undoubtedly correct. But, there was no joint venture intended, no partnership cre-

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[7]Petitioner's Brief pages 12 through 18.

ated thereby and no fiduciary relationship with Taylor and Lerner by virtue of the language singled out in the Lerner writing. The agreements were private as between the parties and complaints were represented by counsel (Lerner). Petitioner, at no time has sought to advantage himself of the disguised loan agreements and avoid his obligations for reasons of usury. Petitioner submits he at all times attempted to save the projects in spite of the spurious law suits filed in June 1980 and the interference by attorney Lerner and his clients.

Petitioner does not suggest the 30 days suspension is inappropriate in these circumstances. Petitioner respectfully submits the Court reconsider, however, and not impose discipline because there was a fiduciary duty or partnership with attendant breach of fiduciary duties, as a result.

Petitioner acknowledges and has heretofore acknowledged his conduct was wrong in participating in the Lerner Agreement. Clearly Petitioner should not have entered into agreements that were a sham to disguise the loans, but it is significant that these agreements advantaged these private lending parties, only. Petitioner further acknowledges and has acknowledged before that there will be no repetition of this conduct. There never has been any conduct of a deceptive kind during Petitioner's practice and in the discharge of Petitioner's responsibility as an attorney, both to his clients and to the public.

Finally, Petitioner is appreciated of the Court's observations regarding Petitioner's record.

Because this record is a burdensome one with intervening decisions by the Federal Courts, it is hoped the Court will not find it an imposition for the Petitioner to have

brought on the within suggestion for rehearing, urging reconsideration for the limited purposes hereinabove set forth.

DATED: August 17, 1987

Respectfully submitted,

LAWRENCE J. GALARDI
Petitioner

REHEARING

PROOF OF SERVICE BY MAIL

STATE OF CALIFORNIA
COUNTY OF LOS ANGELES } ss.:

The undersigned hereby declares and states:

I am and was at all times herein mentioned, a citizen of the United States and a resident of the County of Los Angeles, over the age of eighteen (18) years and not a party to the within proceeding, that my business address is 11755 Wilshire Boulevard, Suite 1370, Los Angeles, California 90025.

That on August 18, 1987, I served the within PETITION FOR REHEARING in said proceeding by depositing true copies thereof, enclosed in a sealed envelope with postage thereon fully prepaid, in the United States mail at Los Angeles, California, addressed as follows:

Clerk of the Supreme Court State of California
3580 Wilshire Boulevard *BY HAND DELIVERY*
Los Angeles, California 90010
(Original and 10 copies)

Clerk, State Bar Court
555 Franklin Street
San Francisco, California 94102

I declare under penalty of perjury that the foregoing is true and correct.

Executed on August 18, 1987, at Los Angeles, California.

MARIANA BAEZ, Declarant

APPENDIX K

KIYOKO TATSUI
Attorney At Law
818 West Seventh Street, Second Floor
Los Angeles, California 90017
213/689-6200

Counsel for The Client Security Fund Commission of THE STATE BAR OF CALIFORNIA

BEFORE THE CLIENT SECURITY FUND
COMMISSION
THE STATE BAR OF CALIFORNIA
CSF 85-253
PROPOSED FINDINGS OF FACT
AND CONCLUSIONS OF LAW

Application of BERNIE LERNER

LAWRENCE GALARDI, *Respondent*

The Client Security Fund application of BERNIE LERNER (hereinafter referred to as "Application") in which reimbursement of $101,000.000 was requested was filed on September 13, 1985.

In July 1985, a decision was rendered in State Bar case #82-0-212 LA (LA 3669), the consolidated discipline matter involving LAWRENCE J. GALARDI (hereinafter referred to as "Respondent"), which included the complaint filed by Applicant. The hearing panel recommended a private reproval as it had made the following findings:

1. *There was no attorney-client relationship between Respondent and Applicant;*

2. *Respondent stood in a fiduciary relationship to Applicant relative to the investment and management of the joint venture project;*

* * *

based on Respondent's actions related to this application, the Review Department has recommended that Respondent be suspended from the practice of law which fulfills the requirements of Rules 2 and 9(b).

4. *Applicant's investment dealings with Respondent did not arise out of an attorney-client relationship; there was no disparity in bargaining power between Applicant and Respondent; Respndent did not become privy to Applicant's financial affairs by virtue of an attorney-client relationship; and the principal part of Respondent's services to Applicant did not require a license to practice law in the State of California. Therefore the conditions of Rule 10 have not been met.*

5. *Respondent was not acting as Applicant's attorney or in any fiduciary capacity as set forth in Rule 9(a).* (emphasis supplied)

WHEREFORE THE COMMISSION APPROVES AND ADOPTS THE FINDINGS OF FACT AND CONCLUSIONS OF LAW AND DIRECTS THAT:

The applicant, BERNIE LERNER, be denied reimbursement from the Client Security Fund.

DATED: _____, 1987

_____

THE CLIENT SECURITY FUND
COMMISSION

PROOF OF SERVICE BY MAIL

I am a citizen of the United States and a resident of the City and County of Los Angeles; I am over the age of eighteen years and not a party to the within action; my business address is: 1706 Maple Avenue, Los Angeles, California.

On December 1, 1987, I served the within Petition for Writ of Certiorari in re: "Lawrence J. Galardi, Petitioner, vs. State Bar of California, Respondent" in the United States Supreme Court, October Term, 1987. The Appendix accompanied the Petition.

Service was made on the Parties in said action, by placing three copies thereof enclosed in a sealed envelope with postage fully prepaid, in the United States post office mail box at Los Angeles, California, addressed as follows:

The State Bar of California
Clerk, State Bar Court
555 Franklin Street
San Francisco, CA 94102
(3 copies)

Clerk, United States Supreme Court
1 First Street, N.W.
Washington, D.C. 20543
(Original and 40 copies)

All parties required to be served have been served.

I certify (or declare), under penalty of perjury, that the foregoing is true and correct.

Executed on December 1, 1987, at Los Angeles, California

Ce Ce Medina

CE CE MEDINA

Supreme Court, U.S.
FILED
JAN 2 1988
JOSEPH F. SPANIOL, JR.
CLERK

No. 87-925

In The

Supreme Court of the United States

October Term, 1987

LAWRENCE J. GALARDI
Petitioner,

vs.

THE STATE BAR OF CALIFORNIA
Respondent,

Petition for Writ of Certiorari
to the Supreme Court of California

RESPONDENT'S BRIEF IN OPPOSITION

DIANE C. YU
TRUITT A. RICHEY, JR.*
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EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

QUESTION PRESENTED

Whether petitioner, a member of the California Bar, may now urge in proceedings before this Court that a judgment of the California Supreme Court, imposing as a condition of probation in an attorney disciplinary proceeding an order for payment of restitution to a person who was not a client of petitioner, but to whom petitioner owed a fiduciary duty, violates the Supremacy Clause of the United States Constitution because the debt underlying the order of restitution was discharged in United States Bankruptcy Court proceedings if:

1. Petitioner did not previously object to the restitution order on Supremacy Clause ground in proceedings before the California Supreme Court;

2. Amicus curiae (on behalf of petitioner) who did argue the matter

before the California Supreme Court (petitioner made no appearance at the oral argument) argued that the period of suspension recommended by The State Bar of California should be reduced by the Court in order to allow petitioner to make restitution; and

3. The California Supreme Court, in apparent reliance on petitioner's expressed wish to make restitution, did reduce the actual period of suspension from one (1) year actual suspension to thirty (30) days so that petitioner could make such restitution.

SUBJECT INDEX

	Pages
QUESTIONS PRESENTED	i-ii
I. STATEMENT OF FACTS	3-7
II. ARGUMENT	
PETITIONER HAS WAIVED ANY OBJECTION BASED ON THE SUPREMACY CLAUSE TO PAYING RESTITUTION ARISING FROM THE IMPOSITION OF DISCIPLINE	8-11
III. CONCLUSION	12

TABLE OF AUTHORITIES

Pages

Cases

Alberton v. State Bar, 37 Cal.3d 1 (1984) 5

Galardi v. The State Bar of California (43 Cal.3d 683 (1987) 2

Fay v. Noia, 372 U.S. 391, 83 S.Ct. 822 (1963) 9

Frommhagen v. Klien, 956 F.2d 1391 (9th Cir. 1972) 9

Henderson v. Duncan, 779 F.2d 1421 (9th Cir. 1986) 9

Lerner v. Galardi (U.S. Bankruptcy Ct. Central Dist. of Cal. No. L.A. 81-06560BR) 4

McCray v. State Bar, 38 Cal.3d 257 (1985) 5

Taylor v. Galardi (U.S. Bankruptcy Ct. Central Dist. of Cal. No. L.A. 81-00606-RS) 4

Yakus v. United States, 321 U.S. 414, 64 S.Ct. 660 (1944) 9

TABLE OF AUTHORITIES
(Continued)

Pages

Constitutions

United States Constitution
Article VI (Supremacy Clause) 8,9

Statutes

California Business and
Professions Code
Section 6086 5

No. 87-925

In the
SUPREME COURT OF THE UNITED STATES

October Term, 1987

LAWRENCE J. GALARDI

Petitioner

v.

THE STATE BAR OF CALIFORNIA

Respondent

RESPONDENT'S BRIEF IN OPPOSITION

Respondent, The State Bar of California, respectfully requests that this Court deny the Petition for Writ of Certiorari, seeking review of the California Supreme Court's order for payment of restitution in connection with

the imposition of discipline against a California attorney in Lawrence J. Galardi v. The State Bar of California (43 Cal.3d 683 (1987)

The California Supreme Court, by order dated August 3, 1987, ordered that petitioner be suspended from the practice of law for a period of one year, that execution of suspension be stayed and that petitioner be placed on probation for five (5) years subject to certain conditions including actual suspension of thirty (30) days and payment of restitution to two of petitioner's co-venturers in the amount of $85,000 and $101,000, respectively. (Petitioner's Appendix B-12) By order dated September 2, 1987, the California Supreme Court denied petitioner's Petition for Rehearing.

I

STATEMENT OF FACTS

The facts essential to this proceeding areas follows:

Petitioner was admitted to the practice of law in California on May 14, 1971. He had previously been admitted to the practice of law in New York in June 1959.

In or about 1977, petitioner entered into a joint venture agreement with John Taylor. In or about 1978, petitioner entered into a separate joint venture agreement with Bernie Lerner. The purpose behind the agreements was to improve and sell two parcels of land in Malibu, California. Taylor invested $85,000 and Lerner $101,000 in their respective joint ventures with petitioner. Petitioner thereafter used funds secured by the joint venture properties for purposes unrelated to the

joint venture agreements, failed to notify or obtain the consent of his co-venturers prior to taking out several loans which encumbered the joint venture properties to the detriment of the joint venture agreements and, in the Lerner matter, failed to provide an accounting of all funds disbursed in connection with the property. Eventually, both properties were foreclosed and both Taylor and Lerner lost their entire investments.

Petitioner subsequently sought to discharge his debts in bankruptcy. On December 23, 1983, the United States Bankruptcy Court, Central District of California, entered its decision in Taylor v. Galardi (L.A. 81-00606-RS) and discharged the debt owed by petitioner to Taylor. On January 24, 1985, the United States Bankruptcy Court, Central District of California, entered its decision in Lerner v. Galardi (L.A. 81-0656-BR). The

court refused to discharge the Lerner debt and concluded, inter alia, that a fiduciary relationship existed between petitioner and Lerner and that petitioner breached his fiduciary obligation in that he misappropriated certain joint venture funds.

A Hearing Panel of the State Bar Court[1] recommended that petitioner

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[1] In California, the State Bar Court contains numerous Hearing Panels which take evidence, make findings of fact and, if appropriate, recommendations of discipline. There is also one Review Department which reviews Hearing Panel decisions and either adopts or (after giving the parties an opportunity to be heard) modifies the Hearing Panel's decision. The final disciplinary recommendation of the State Bar to the Supreme Court is that of the Review Department. (Cal. Bus. & Prof. Code, § 6086.) The member may thereafter seek review of the State Bar's recommendation in the California Supreme Court. Once review is granted, the California Supreme Court conducts an independent examination of the entire record, weighs the evidence and passes upon its sufficiency. Alberton v. State Bar, 37 Cal.3d 1, 11 [206 Cal.Rptr. 373, 686 P.2d 1177] (1984). The ultimate determination as to the degree of discipline to be imposed is made by the California Supreme Court. McCray v. State Bar, 38 Cal.3d 257, 272 [211 Cal.Rptr. 691, 696 P.2d 83] (1985).

receive a private reproval. The Review Department recommended that petitioner be suspended from the practice of law for a period of three (3) years, that execution of suspension be stayed, and that petitioner be placed on probation for such period, subject to certain conditions including actual suspension of one (1) year and until restitution of $166,000 had been made to his co-venturers. The California Supreme Court, in its decision, expressed concern that the Review Department's recommendation would prevent petitioner from ever returning to the practice of law because it would be unlikely that petitioner would be able to comply with restitution requirements if he could not practice law. (Petitioner's Appendix B-11, B-12) The California Supreme Court concluded that the appropriate discipline be formulated to give petitioner an adequate opportunity to

repay his obligations. The Court ordered that petitioner be suspended for one (1) year, that execution of suspension be stayed, and the petitioner be placed on probation for five (5) years with only thirty (30) days' actual suspension. The conditions of probation required, inter alia, that petitioner pay restitution in the amount of $101,000 to Bernie Lerner and $85,000 to John Taylor over the five (5) year probationary period.[2]

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[2] At oral argument before the California Supreme Court, petitioner did not make an appearance but requested that amicus curiae on his behalf be allowed to address the Court for the entire period. Amicus suggested to the Court that petitioner should repay the debts and that it would be reasonable to expect petitioner to do so within a five (5) year period. The Court agreed and, accordingly, adopted the aforementioned degree of discipline. (Petitioner's Appendix B-12)

II

ARGUMENT

PETITIONER HAS WAIVED ANY OBJECTION BASED ON THE SUPREMACY CLAUSE TO PAYING RESTITUTION ARISING FROM THE IMPOSITION OF DISCIPLINE.

Petitioner's principal argument appears to be that since the $85,000 debt to Taylor was discharged in bankruptcy, restitution to Taylor is barred by the Supremacy Clause of the United States Constitution. U.S. Const., art. VI. The Lerner debt does not appear to be at issue since it was not discharged in bankruptcy.

At no point throughout the State Bar disciplinary proceeding or before the California Supreme Court did petitioner object to the State Bar's restitution recommendation on this ground. No mention was made of this issue before the State Bar Court nor by petition in brief or oral argument before the California Supreme Court. Petitioner's brief did refer to the bankruptcy proceedings, but only to

support his contention that the Taylor agreement was not a joint venture agreement and did not, therefore, involve a fiduciary relationship. The only time the supremacy argument was raised was in a brief filed by amicus curiae. The California Supreme Court, in its decision, noted amicus' argument but held that since petitioner had not objected to the State Bar's restitution recommendation on Supremacy Clause grounds, petitioner had waived any objection to restitution based on the Supremacy Clause. See Fay v. Noia, 372 U.S. 391, 475, 83 S.Ct. 822, 867 (1963); Yakus v. United States, 321 U.S. 414, 64 S.Ct. 660, 667 (1944); Henderson v. Duncan, 779 F.2d 1421, 1425 (9th Cir. 1986); Frommhagen v. Klien, 956 F.2d 1391, 1395 (9th Cir. 1972).

Furthermore, although amicus argued in his brief that the Supremacy Clause barred restitution of the Taylor debt, at oral

argument before the California Supreme Court, amicus suggested to the Court that petitioner should repay the money that John Taylor and Bernie Lerner contributed to the real estate ventures. (Petitioner's Appendix B-12)

The California Supreme Court agreed with the oral suggestion of amicus and reduced the discipline imposed so as to allow petitioner to continue to practice law and repay the money he owed Taylor and Lerner. (Petitioner's Appendix B-12)

Petitioner has completed the thirty (30) day period of actual suspension imposed by the California Supreme Court and has, in essence, decided that he does not want to comply with the probationary terms. Petitioner should not now be permitted to reframe the discipline imposed by the California Supreme Court because of a constitutional objection he did not once raise throughout the entire disciplinary

proceedings. Petitioner, by his apparent lack of objection to discipline requiring payment of restitution, obtained a substantial reduction in the actual suspension imposed. He would eat his cake and keep it, too. He should not succeed.

III

CONCLUSION

The decision below was decided in accord with constitutional principles.

The petition for the Writ of Certiorari should be denied.

Dated: December 31, 1987

Respectfully submitted,

Diane C. Yu
Truitt A. Richey, Jr.
Richard J. Zanassi

By
Truitt A. Richey, Jr.
Counsel of Record

Attorneys for
The State Bar of California

DECLARATION OF SERVICE BY MAIL

I, Chiyeko Kimura, declare as follows:

I am a citizen of the United States and a resident of the County of San Francisco. I am over the age of eighteen years and not a party to the within entitled action. My business address is 555 Franklin Street, San Francisco, California 94102. On February 1, 1988, I served the within

RESPONDENT'S BRIEF IN OPPOSITION

on the interested parties by placing a true copy thereof enclosed in a sealed envelope with first-class postage thereon fully prepaid in the United States mail at San Francisco, California, addressed as follows:

Lawrence J. Galardi
11755 Wilshire Boulevard
Suite 1370
Los Angeles, California

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct and that this declaration is executed this 1st day of February, 1987 at San Francisco, California.